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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Petitioner)	
)	
-VS-)	CA No. 07-12064-PBS
)	Pages 2-1 - 2-140
TODD CARTA,)	
)	
Respondent)	

BENCH TRIAL - DAY TWO

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
December 14, 2010, 9:15 a.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
(617)345-6787

1 A P P E A R A N C E S:

2
3 EVE A. PIEMONTE-STACEY, ESQ. and JENNIFER A. SERAFYN, ESQ.,
4 Assistant United States Attorneys, United States Attorney's
Office, 1 Courthouse Way, Boston, Massachusetts, 02210,
for the Petitioner.

5 IAN GOLD, ESQ. and TAMARA FISHER, EXQ., Federal Public
6 Defender Office, District of Massachusetts, 51 Sleeper Street,
5th Floor, Boston, Massachusetts, 02210, for the Respondent.

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Page 3

I N D E X

WITNESS

DIRECT

CROSS

REDIRECT

RECROSS

AMY PHENIX

By Mr. Gold:

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By Ms. Serafyn:

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By Mr. Gold:

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P R O C E E D I N G S

THE COURT: Do you want to call the case? Well, it's a continuation of the case. She's still under oath. Mr. Gold, it's your opportunity here. You're up at bat.

MR. GOLD: Thank you. Your Honor, I'm going to use the document camera and then come over here sometimes.

THE COURT: Do whatever you want.

MR. GOLD: Thank you very much.

THE COURT: Short of leaving.

MS. PIEMONTE-STACY: He can leave.

MR. GOLD: I'm resisting the urge.

AMY PHENIX

having been previously duly sworn, was examined and testified further as follows:

CROSS-EXAMINATION BY MR. GOLD:

Q. Good morning, Dr. Phenix.

A. Good morning.

THE COURT: Let me just ask, is there anybody else who's going to be a witness today, to our knowledge?

MR. GOLD: Not today. I have reached out and made contact with our experts about setting something up for next week, and we expect to be able to confirm something with Mr. Alba early next week.

THE COURT: Okay. Just I saw someone else out there. I didn't know that we had any scheduling issues. That's fine.

1 Q. Dr. Phenix, we spoke yesterday about the diagnosis of
2 hebephilia. Do you recall that?

3 A. Yes.

4 Q. And "hebephilia" is a term that exists in the psychological
5 literature?

6 A. Yes.

7 Q. And we talked about the upcoming DSM-V. Do you recall
8 that?

9 A. Yes.

10 Q. When is the DSM-V going to come out? Do you have any
11 knowledge of that?

12 A. No.

13 Q. Right now, the DSM-V has committees that are considering
14 proposed diagnoses for the new book. Is that a fair statement?

15 A. Yes.

16 Q. And one of those committees is considering sexual disorder
17 diagnoses?

18 A. Yes.

19 Q. And the diagnosis that we spoke about yesterday and the
20 criteria that we looked at is a proposal from one of these
21 committees, right?

22 A. Yes.

23 Q. Now, yesterday you testified that your understanding of
24 hebephilia is the same as the diagnosis that we were speaking
25 of yesterday?

1 A. Yes, similar to that, yes.

2 Q. And you stated that people who are afflicted with
3 hebephilia, or pedohebephilia as it's going to be called, have
4 a sexual attraction to immature humans, I believe, between the
5 ages of eleven and fourteen?

6 A. Yes.

7 Q. And you said that you could describe those people as
8 becoming pubescent?

9 A. Yes, during pubescence.

10 Q. Or going through pubescent. Do you recall saying that?

11 A. Yes.

12 Q. And do you recall Ms. Serafyn asked you whether people in
13 the age range of sixteen to seventeen would qualify as being
14 part of the focus of people afflicted with this diagnosis?

15 A. Yes.

16 Q. And you said "not in my opinion," right?

17 A. Yes, although I allowed that there are different -- that
18 some children don't become pubescent until later. So the
19 average would be eleven to fourteen. It's possible that a
20 child could still be going through pubescence at fifteen or
21 sixteen, so I would make that consideration.

22 Q. At fifteen or sixteen?

23 A. Right.

24 Q. And you testified that what the Blanchard -- Ray Blanchard
25 is the name of one of the researchers who is describing this

1 diagnosis in the literature right now, right?

2 A. Right. He's the first author.

3 Q. He's the first author of a research article describing
4 some research in which this diagnosis is proposed for inclusion
5 in the DSM, right?

6 A. Right.

7 Q. And in fact the research article that we discussed and was
8 entered into evidence describes a body of research by this
9 research group headed by Dr. Blanchard and a proposal that it
10 be included in the forthcoming DSM-V, right?

11 A. Yes.

12 Q. Now, you said that you had consulted this article prior to
13 or in the process of developing your original opinion in this
14 case. Do you recall that?

15 A. Yes, I believe that I read it, uh-huh.

16 Q. And you said that your diagnosis was consistent with what
17 they had proposed. Do you recall that?

18 A. I think it is, yes.

19 Q. But, now, you testified in a trial in this case in
20 February of 2009 over a year ago, right?

21 A. Correct.

22 Q. And during that trial you talked about the purpose of
23 diagnosis and stated that the purpose of a diagnosis or one of
24 the purposes is so that clinicians can communicate with each
25 other. Is that a fair statement?

1 A. Yes, the diagnoses in the DSM-IV-TR.

2 Q. Well, that's one of the reasons you have diagnoses, so
3 that you can communicate information to someone by diagnosing
4 them about that person, right?

5 A. Yes, to have agreement.

6 Q. And for the record, I'm putting up on the document viewer
7 your testimony from this trial, day one.

8 THE COURT: Excuse me. Is that my trial or
9 Judge Tauro's trial?

10 MR. GOLD: Judge Tauro's trial. I'm looking for the
11 date. I don't see it on the first page of this, but
12 February 9, 2009, Page 184.

13 Q. And you testified that "Hebephilia is well recognized by
14 those of us that work in this field diagnostically. If someone
15 comes to me and says, you know, 'I've provided this diagnosis,'
16 I know exactly what it means. You testified it means that the
17 person does not just have sexual arousal or perhaps any sexual
18 arousal to prepubescent children, but that is this preference
19 for young teens to -- throughout the teenage years actually
20 till about age seventeen."

21 That was your testimony?

22 A. Yes.

23 Q. Now, the way the diagnoses are included in the manual is,
24 research is performed prior to the diagnosis being adopted in
25 the manual; is that right?

1 A. Yes.

2 Q. And part of the purpose of that research is to develop
3 information about the condition, right?

4 A. Yes.

5 Q. And part of the information that you might develop about
6 the condition is information about its chronicity or how long
7 it lasts, right?

8 A. Yes.

9 Q. And in fact pedophilia is a diagnosis which is included in
10 the manual, correct?

11 A. Yes.

12 Q. And there have been research studies about, for example,
13 the chronicity of pedophilia, right?

14 A. Yes.

15 Q. And there have been research studies about different
16 people who were afflicted with different types of pedophilia;
17 for example, fixated pedophiles versus nonexclusive pedophiles?

18 A. That's very old research, it's not used anymore, but there
19 was research that described pedophilia that way as fixated.

20 Q. Well, this is part of the process or the research which
21 makes a diagnosis includable in the DSM, right?

22 A. That really wasn't research-based, determining a fixated
23 pedophile. That was just a typology, a description based on
24 observation. But certainly there are scientific studies that
25 are examining various aspects of pedophilia.

1 Q. Well, but you have testified that, for example, pedophiles
2 with male victims are more likely to reoffend than pedophiles
3 with female victims based on a statement in the DSM, right?

4 A. A statement in the DSM, the Hanson-Bussiere meta-analysis.
5 There's lots of --

6 Q. But the statement in the DSM in particular is based on
7 research, right?

8 A. It is, yes.

9 Q. And the DSM informs you or directs clinicians to add a
10 qualifier such as exclusive or nonexclusive when diagnosing
11 someone with pedophilia, correct?

12 A. Yes.

13 Q. And presumably that practice is also based on the research
14 regarding that particular affliction, right?

15 A. Presumably.

16 Q. Has there been research done of which you're aware
17 regarding the chronicity of hebephilia?

18 A. Not that I'm aware of, no.

19 Q. Now, Dr. Phenix, I want to ask you a few questions about
20 your background and qualifications. You are essentially, well,
21 a professional witness. Is that a fair statement?

22 A. Yes.

23 Q. A good part of your work life is taken up with testifying
24 in cases such as this one, right?

25 A. That's right.

1 Q. And another good part of your work life is taken up doing
2 trainings and things for people involved in the management of
3 sex offenders?

4 A. Yes.

5 Q. For the record, I'm putting up on the document viewer an
6 image of a website. Do you recognize your website on the
7 document viewer?

8 A. Actually, it's not on, my viewer.

9 THE CLERK: Turn the monitor on, the right-hand side
10 button, the lower right-hand.

11 A. I recognize this, yes.

12 THE COURT: You know, just as yesterday when I
13 couldn't read it, for some reason this is blurry on my -- is
14 there a way of, like, focusing in on it?

15 THE WITNESS: Mine is also blurry.

16 THE COURT: Yesterday's was a problem too, but
17 anyway -- oh, oh.

18 MR. GOLD: No, I think this will be good. Oh, no,
19 that's too big, too big. Sorry.

20 (Discussion off the record.)

21 THE COURT: Can you all see that?

22 MR. GOLD: I'm not actually getting into much detail
23 on this, Judge.

24 THE COURT: All right.

25 Q. And it says there "Amy Phenix, Ph.D., Incorporated"?

1 A. Right.

2 Q. And so you are an incorporated business?

3 A. I am.

4 Q. And do you have employees that work for you?

5 A. I do.

6 Q. And do they do any of this work that we've just talked
7 about, report writing or testifying?

8 A. I have one individual who helps me with the legal
9 documents and writing up the case, but no one testifies.

10 Q. So with respect to the report that you've done in this
11 case, did anyone help or participate with you in drafting the
12 report?

13 A. No.

14 Q. And when you refer in your reports to "we," are you
15 referring to other people in your corporation?

16 A. I don't know. I don't -- I don't recall saying "we."

17 Q. Your career has started in about 1990, is that right, as a
18 clinical psychologist?

19 A. Yes.

20 Q. Now, you obtained your professional degree from the
21 California School of Professional Psychology; is that right?

22 A. Correct.

23 Q. And you did not focus as a student on sex offenders in
24 particular, right?

25 A. Correct.

1 Q. And in fact, as a student, you did not involve yourself in
2 forensic psychology specifically, right?

3 A. Uhm, I did during my clinical internship but not in my
4 class work.

5 Q. So after your class work was done, you got a job
6 essentially at a prison; is that right?

7 A. Right. That's where I did my clinical internship.

8 Q. And was that the California Men's Colony?

9 A. Yes.

10 Q. And how long was that clinical internship?

11 A. One year.

12 Q. Now, you've had experience treating sex offenders, right?

13 A. Yes.

14 Q. And you cite that experience as part of the experience on
15 which you rely when you do these evaluations, right?

16 A. Yes.

17 Q. And when you were doing your clinical internship at the
18 California Men's Colony, did you do any treatment there?

19 A. Yes.

20 Q. And what did that treatment consist of?

21 A. I provided individual therapy for about four years to a
22 case load of inmates, many of who had committed sex offenses.
23 It's a protective custody prison, so there were a lot of
24 individuals who committed sex offenses. I also provided other
25 types of group therapy to -- call them lifers, individuals who

1 had committed homicides and had life sentences, on life skills,
2 anger management, interpersonal skills, that type of thing.

3 Q. Well, that therapy that you were providing was not
4 sex-offender-specific treatment, correct?

5 A. Not those groups for lifers, but the individual therapy,
6 much of it was, yes.

7 Q. Was it sex-offender-specific therapy or psychotherapy
8 provided to people who happened to be sex offenders?

9 A. Well, it was a long time ago, and we didn't have the same
10 type of structured cognitive behavioral treatment programs, so
11 it was primarily a psychotherapy but focused on not reoffending
12 sexually or criminally, and gaining the pro-social skills to be
13 able to do that.

14 Q. Now, at some point you did facilitate -- well, let me
15 withdraw that. Now, does California have a sex offender
16 commitment law?

17 A. Yes.

18 Q. And when was that passed?

19 A. January 1, 1996.

20 Q. January 1, 1996. Now, when you were working at the
21 California Men's Colony, did you have an opportunity to change
22 jobs?

23 A. Yes. I changed jobs.

24 Q. And where did you go after the California Men's Colony?

25 A. I went to the Parole Department, California Parole

1 Department, Fresno, California.

2 Q. And after that, did you go to the Department of Mental
3 Health?

4 A. Yes.

5 Q. And why did you go to the Department of Mental Health?

6 A. To become a clinical consultant for the Sex Offender
7 Commitment Program.

8 Q. Now, is the name of the person who invited you there Craig
9 Nelson? Is that something that I recall correctly?

10 A. Yes.

11 Q. So Craig Nelson invited you to come over to help start a
12 sex offender evaluation program for this new commitment law.
13 Is that a fair statement?

14 A. Yes.

15 Q. And when he asked you to do that, you didn't have any
16 special expertise in the evaluation of sex offenders. Is that
17 a fair statement?

18 A. Well, I -- I had evaluated several hundred sex offenders,
19 so I did have experience.

20 Q. Well, but when you say you evaluated them, what exactly
21 does that mean?

22 A. Well, any -- California Men's Colony was a large
23 psychiatric hospital and protective custody prison, so as
24 inmates were referred to the prison, they needed to be
25 evaluated when they got there. And then a treatment plan was

1 developed, and then they were placed into some type of
2 treatment program or not, or sent back out. And so I evaluated
3 many sex offenders at the California Men's Colony, diagnosed
4 them, provided a treatment plan for them, and provided
5 treatment to them.

6 THE COURT: Did any of them get better, so to speak,
7 and were able to control their impulses?

8 THE WITNESS: I wouldn't know because I didn't follow
9 them once they were released. Seemingly they gained skills in
10 treatment, but that really wouldn't tell you anything. You
11 would need to see a follow-up of how they did once released to
12 the community.

13 THE COURT: Well, did you ever actually follow someone
14 through and provide them therapy and then feel as if they could
15 control their impulses?

16 THE WITNESS: Oh, yes.

17 THE COURT: And you recommended release?

18 THE WITNESS: Uhm, those individuals I had in
19 treatment groups in the Parole Department, and I thought that
20 they improved, and I could see that they did not reoffend when
21 I was working there. In terms of the prison, they had
22 determinant sentences, so I had nothing to do with when they
23 would be released.

24 THE COURT: I see. So it wasn't a civil commitment
25 situation like this?

1 THE WITNESS: Exactly.

2 THE COURT: So you've never been involved in sort of,
3 the guy's got a problem, maybe a chronic problem, and then you
4 work with him, and then you say, "Well, I think he can control
5 himself now," and recommend release? You've never been in that
6 situation?

7 THE WITNESS: Well, I have actually. I've had
8 several -- I've had maybe three or four cases where I've worked
9 for the respondent once they have completed treatment in the
10 Sex Offender Commitment Program in California as a sexually
11 violent predator where they've completed treatment, and I made
12 recommendations for their release; or they have been released
13 to conditional release, so they're on supervision, and I've
14 made recommendations that supervision could end.

15 Q. Now, going back to the early 1990s for a minute, so you
16 provided this treatment to all the offenders that were referred
17 to you at the California Men's Colony, right?

18 A. Well, I provided treatment to some of the offenders. I
19 evaluated many, and some of those I provided treatment to.

20 Q. Well, what was your task there when you were referred an
21 inmate? Were all inmates who came in referred to you?

22 A. No. There was an intake team, and that team was a
23 multitude of psychologists who did incoming evaluations. We
24 provided -- we conducted a mental status examination, we took a
25 psychosocial history, we provided a diagnosis, and then we

1 provided a treatment plan, and then they were referred to
2 treatment groups. And I did some of those groups; I did some
3 individual therapy.

4 Q. But wasn't that therapy primarily for psychological issues
5 of the typical variety; for example, depression and things of
6 that nature?

7 A. Sometimes. Sometimes it was sex offenders, and we worked
8 on sex offender issues.

9 Q. But they were referred because of these other primary
10 ailments such as depression, things that would require referral
11 to the mental health unit?

12 A. No, not always.

13 Q. Not always?

14 A. Treatment was available. You could have a case load of
15 individual therapy that you selected individuals, and they
16 didn't have to have a secondary -- a dual diagnosis, for
17 example. They could have just had pedophilia and been there
18 for protective custody or for other reasons rather than
19 psychiatric purposes.

20 Q. And is that the extent of your experience as a therapist,
21 providing treatment to sex offenders?

22 A. No. I had a private therapy practice in California from
23 the time that I was licensed for about five years. I have
24 postdoctoral training in sex therapy. I was a sex therapist
25 for a number of years. In the community I also treated --

1 provided psychotherapy for adults in my private practice, so

2 I --

3 Q. Well, so psychotherapy for adults, and you just mentioned
4 this human sexuality part of your practice?

5 A. Right.

6 Q. Is that related to the study of abnormal psychology?

7 A. Well, there was a minimal amount of training, I would say,
8 in deviant sexual behavior.

9 Q. A minimal amount?

10 A. Yes, a minimal amount. I mean, there was some but not
11 much.

12 Q. And then the work that you were doing was counseling
13 couples essentially?

14 A. That's right, that's right.

15 Q. And that was before your work in correctional psychology
16 that we're talking about right now?

17 A. I did it at the same time. I worked evenings and weekends
18 in my private practice, and I worked at the prison kind of 8:00
19 to 5:00 during the week.

20 Q. Now, Craig Nelson, when he asks you to come over to the
21 sex offender treatment program that he was starting up, he gave
22 you a packet of research, right?

23 A. He did, yes.

24 Q. So that you could start to educate yourself about the
25 research in this area of forensic psychology, right?

1 A. Right, so new research had just come out.

2 Q. After you got this research, I believe he asked you to do
3 it, and then I believe you've testified that you went to the
4 Association for the Treatment of Sexual Abusers' annual
5 conference, right?

6 A. Right.

7 Q. And that was the first time you had ever gone to that
8 particular conference, right?

9 A. That's right.

10 Q. And one of the things that Dr. Nelson had given you was
11 this meta-analysis which this Court has heard about, then in
12 unpublished form, by Dr. Karl Hanson, right?

13 A. Yes.

14 Q. And a meta-analysis is a study, a quantitative study of
15 other studies, and this was one about characteristics
16 associated with sexual reoffending, right?

17 A. Right.

18 Q. And you then, as one of the first steps that you took in
19 this post at the California Department of Mental Health, you
20 hired Dr. Hanson as a consultant, right?

21 A. Yes.

22 Q. And you worked with him to develop a protocol for
23 evaluating sex offenders for the new Sex Offender Commitment
24 Program in about 1995-1996, right?

25 A. Yes.

1 Q. This Court has heard a lot of testimony, but the first
2 development after this, I think, of significance is that the
3 Hanson group or Dr. Hanson develops an actuarial instrument,
4 right?

5 A. Yes.

6 Q. And that was a way to combine these factors because prior
7 to this, people were just sort of summing them up, right?

8 A. Yes.

9 Q. And this was a mechanistic way to combine them to improve
10 the accuracy of predictions, right?

11 A. Yes.

12 Q. And that is always the purpose of these developments in
13 the field, is ostensibly to improve the accuracy of these
14 determinations, right?

15 A. Yes.

16 Q. And that's because the old saw is that clinical judgment
17 is notoriously unreliable, right?

18 A. Yes.

19 Q. And that these mechanical methods of combining these
20 factors is more accurate for a number of reasons, right?

21 A. Yes.

22 Q. One of those reasons is, it removes human bias, right?

23 A. Yes.

24 Q. Or thought to be one of the reasons, right?

25 A. Right.

1 Q. Now, after the RRASOR, Dr. Hanson met with someone named
2 Dr. David Thornton who had his own instrument, right?

3 A. Yes.

4 Q. And that was called the S-A-C-J or Minimum or something
5 like that, right?

6 A. SACJ-Min.

7 Q. SACJ-Min. And they combined those, and from that
8 combination was born the Static-99, right?

9 A. Yes.

10 Q. One of the interesting features about the RRASOR is that
11 it started with seven items, but then Dr. Hanson found that
12 three of them didn't improve the thing, so at the end of the
13 day, it was just four items, right?

14 A. Yes. That was the development, yes.

15 Q. But then he combined it with Dr. Thornton's instrument,
16 and so then there were ten, right?

17 A. Right.

18 Q. Ten items. And the Static-99 has come to occupy, really
19 occupy the field of actuarial instruments since it was
20 introduced, right?

21 A. Yes.

22 Q. Now, after the actuarial was introduced, Dr. Hanson asked
23 you to do a coding manual, right?

24 A. Yes.

25 Q. And that was based on your experience in California

1 working with Dr. Hanson and evaluating sex offenders, right?

2 A. Yes.

3 Q. And you'd seen many coding issues come up, and so you were
4 well qualified to do a coding manual for the instrument, right?

5 A. Yes.

6 Q. But that coding manual was dated in 2000, and that was
7 about a 15-page document, right?

8 A. Originally, yes.

9 Q. And then subsequently in 2003 with some other authors, a
10 new coding manual was developed which was much lengthier,
11 right?

12 A. Yes.

13 Q. Now, that Static-99 was based on a sample of about 1,054
14 individuals, right?

15 A. Yes.

16 Q. And it was based on individuals who had been released from
17 prisons and mental hospitals in the 1970s and the 1980s, right?

18 A. Yes.

19 Q. And the experience tables -- well, an experience table is
20 where we get the percentages associated with particular scores
21 on the instrument, right?

22 A. You can call it an experience table, sure.

23 Q. And those experience tables were based on this old sample,
24 right? Or, I'm sorry, this four old samples of individuals
25 released in the 1970s and 1980s, right?

1 THE COURT: Mr. Gold, I just want to make sure. I
2 don't know where you're going with this.

3 MR. GOLD: Yes.

4 THE COURT: So I don't know, but is this essentially a
5 Daubert attack on the actuarial tables?

6 MR. GOLD: I've just been developing some context to
7 get to where we are today for --

8 THE COURT: Because we are going to finish with her
9 today.

10 MR. GOLD: Of course, yes.

11 THE COURT: Okay, I just wanted to --

12 A. I'm sorry.

13 Q. And so those numbers were based on that old sample, right?

14 A. The numbers were based on the validation of the UK sample,
15 the 531 UK inmates.

16 Q. And those were the numbers for about seven or eight years,
17 right, that individuals would report when reporting Static-99
18 scores, right?

19 A. That's right.

20 Q. And it was a common criticism of those numbers from
21 defense experts, for example, or in the field that they might
22 be too high, right?

23 A. Yes, that was a common criticism by defense experts.

24 Q. Well, but there were many cross-validations of the
25 Static-99 during this period, right?

1 A. Yeah. Oh, yes.

2 Q. And those cross-validations confirmed that the instrument
3 did pretty well sorting people into risk bins, right?

4 A. Yes.

5 Q. But the percentages of reoffense were all over the place.
6 Is that a fair statement?

7 A. They were different, yes.

8 Q. And in recognition of this, the Hanson group in, I think,
9 2008 did a broad re-validation, right?

10 A. Yes, a partial re-validation. It was completed in 2009.

11 Q. Well, they looked at a large number of contemporary
12 samples, right?

13 A. In 2008, 18 samples they looked at.

14 Q. In 2008, 18 samples?

15 A. Right.

16 Q. And then in the ATSA conference in 2008, they introduced a
17 new way to talk about the Static-99, right?

18 A. Yes.

19 Q. And they said that the recidivism rates in the old table
20 were overestimates, right?

21 A. Yes.

22 Q. And they said that they'd found that with contemporary
23 samples, the percentages were lower, right?

24 A. Yes.

25 Q. And what they did was, they took those samples and they

1 developed two groups of samples which they called high and low
2 risk, right?

3 A. Yes.

4 Q. And they told evaluators to, when they reported a
5 Static-99 score, to give low and high risk, right?

6 A. A range?

7 Q. A range of risk, right?

8 A. Right.

9 Q. And this was in 2008, right about the time that you wrote
10 your report in this case, right?

11 A. Uhm, let's see. Yes.

12 Q. And so while this case was pending, the field was changing
13 somewhat, right?

14 A. Well, the reporting of Static-99 was changing.

15 Q. Well, the meaning of what a Static-99 score was had
16 changed, right?

17 A. Well, not the relative risk. The low, medium, and high
18 ranges never changed, but the absolute probability, the way to
19 report that had changed.

20 Q. Well, now, you call what you do to develop an opinion for
21 this Court "clinically adjusted actuarial risk assessment,"
22 right?

23 A. I would say so, yes.

24 Q. But your method has changed over the years, right?

25 A. Well, of course. The instruments have changed, and how

1 you interpret them has changed.

2 Q. Well, you started out doing empirically guided clinical
3 judgment, right?

4 A. Yes.

5 Q. And then you went to clinically adjusted actuarial risk
6 assessment?

7 A. Yes.

8 Q. And that was for about over a decade, right, that you did
9 one version or another of that method, right?

10 A. Right.

11 Q. And then in this case, when you testified in February of
12 2009, you had recently changed your methodology. Do you recall
13 that?

14 A. Yes.

15 Q. And you had changed your methodology to one which you
16 called "pure actuarial," right?

17 A. Uhm, I don't recall saying that it was pure actuarial.
18 I -- I had more focus on the actuarials and less on the dynamic
19 risk factors at that time, but I still considered the dynamic
20 risk factors. So that wouldn't be pure actuarial technically.

21 Q. Do you recall participating as an expert witness in the
22 case of United States v. Wayne Hunt in this courthouse?

23 A. Yes, I do.

24 Q. And do you recall testifying at trial in April of 2009 in
25 that case?

1 A. Well, I don't remember my testimony, but I know that I did
2 testify.

3 Q. And if you look at this screen, does that refresh your
4 memory as to whether you were describing what you did at that
5 time as a pure actuarial method?

6 A. Let me review it.

7 (Witness examining transcript.)

8 A. Yes. I still maintain -- perhaps I didn't say it as well
9 there -- that technically I did consider the dynamic risk
10 factors, but I didn't adjust the actuarial instruments based on
11 those risk factors at that time. I do today, but I did not at
12 that time based on some recent research. So you could describe
13 it as pure actuarial, but I would have still discussed the
14 dynamic risk factors, but I wouldn't have adjusted the
15 actuarial instruments based on those dynamic risk factors.

16 Q. Well, what happened in the 2008 is, they switched from
17 just telling you to report one percentage, and then after ATSA,
18 they said, "We want you to report a range." That occurred,
19 right?

20 A. It did.

21 Q. When you'd report the Static-99?

22 A. That's right.

23 Q. And then about that same time, you said in trial in the
24 Hunt case -- it was about April -- that you'd switched to a
25 pure actuarial method where you used the dynamic factors, but

1 you did not -- you would not state that the risk was outside
2 the range of those instruments, right?

3 A. Correct, that's right.

4 Q. And that was because of research by Dr. Hanson which said
5 that adding dynamic factors to an actuarial equation, I guess,
6 did not improve the accuracy of clinicians' decision-making,
7 right?

8 A. Actually, it lowered the predictive accuracy.

9 Q. Lowered. And that was Hanson looking at three particular
10 studies, right?

11 A. Right.

12 Q. And I asked you at this trial, I said, "So that research
13 finding was important enough for you to change your method?"
14 And you replied "Yes," is that right?

15 A. Well, yes, because Dr. Hanson advised us to change the
16 method.

17 Q. And you took his advice, right?

18 A. Right, I did.

19 Q. And you changed a method that you had been using for many
20 years because of that advice, right?

21 A. Uhm, changed it somewhat. Much of it remained the same,
22 of course. I always placed a great deal of emphasis on the
23 results of the actuarial instruments, so it wasn't a major
24 departure from what I had been doing.

25 Q. Well, but a major departure was, you were telling

1 courts -- or a departure was, you were telling courts that
2 "Whatever that high number is, I can't opine that the risk is
3 any greater than that based on the research." That's what you
4 were saying at this time?

5 A. Well, I would never say that. If someone -- if there were
6 other factors involved in a case that I determined increased
7 the person's risk over the actuarials, I would always consider
8 that. I would never say that a certain probability applied to
9 this individual and it could never be greater than that just
10 because an actuarial instrument tells me that. I mean, it's a
11 case. I have to consider the case factors.

12 Q. Well, but you were using the dynamic factors, and you just
13 testified, to adjust within that range, right?

14 THE COURT: You know, the problem is, I'm getting
15 confused now. Can we talk about this case as to what she did
16 here and whether she adjusted and that sort of thing?

17 MR. GOLD: Okay.

18 THE COURT: Because I'm getting lost in another case
19 that you know a lot about and I don't.

20 MR. GOLD: Right, and I'm trying to develop helpful
21 context, but I can see how that's happening, so I'll try to
22 loop it back.

23 THE COURT: All right.

24 Q. They've exchanged the way you should report the scores
25 again, right, the Hanson group?

1 A. Of the Static-99R and Static-2002?

2 Q. That's right.

3 A. Yes. In 2009 the final analysis was done, and the
4 recommendations were that there would be four sample types and
5 to choose one of the four sample types.

6 Q. So now when an evaluator is scoring a Static-99 -- you
7 said that with the Static-99R in your testimony yesterday,
8 there was one difference from the Static-99, right?

9 A. Right, the Item 1, age item.

10 Q. Age item. But another difference is this choice of
11 choosing a sample before you report the scores, right?

12 A. That's a difference in using the instrument. The only
13 difference in the instrument is Item 1.

14 Q. But in using the instrument, now you report four different
15 scores, right, or you choose from among four different samples,
16 right?

17 A. You choose the appropriate sample type from four samples
18 in terms of finding an absolute, if you're looking for an
19 absolute probability of reoffense.

20 Q. And are you looking for an absolute probability of
21 reoffense in this case?

22 A. Yes. I did consider that in this case.

23 Q. And in your old report, you reported the Static-99
24 percentages from ten years ago, right?

25 A. Well, yes.

1 Q. Because those were the percentages at the time?

2 A. The original instrument, yes.

3 Q. When you testified in trial in February of 2009, you said
4 that the Static-99 was associated with a range of scores,
5 right?

6 A. Yes.

7 Q. And that was your testimony. That's what the Static-99 --
8 the same score but different percentages associated with it,
9 right?

10 A. Right.

11 Q. And now in 2010, the score is one point less, but we have
12 different percentages, right?

13 A. Yes.

14 Q. And even if he had not turned fifty, you'd be talking
15 about different percentages, right?

16 A. Right. When the validation went from 18 samples to 23, of
17 course the probabilities of reoffense would change. The sample
18 changed.

19 Q. Well, the sample --

20 THE COURT: Here's my problem. You're both losing me
21 as if you're having this private conversation, so if we can
22 just backtrack a minute. So what's the difference between what
23 you did in Judge Tauro's trial and my trial?

24 THE WITNESS: At the time of Judge -- you know, I
25 don't exactly recall everything that I did in that case, but

1 from what I can see here, the Static-99 had a new validation on
2 a much, much larger sample. What was found was that the
3 probabilities of sexual reoffense associated --

4 THE COURT: What was found in the Tauro trial?

5 THE WITNESS: Yes.

6 THE COURT: Or here?

7 THE WITNESS: In the Tauro trial.

8 MS. SERAFYN: Your Honor, just for clarification, when
9 we talk about the Tauro trial, are we talking about the
10 original Carta trial, or are we talking about the Hunt trial?

11 THE COURT: I don't even know who Hunt is, so this is
12 why I'm getting lost here a little bit. I'm just trying to
13 understand. I'm assuming that there have been different
14 methodologies, may result in different statistical ranges. So
15 Mr. Hunt was another trial in front of Judge Tauro? Is that
16 it?

17 MS. PIEMONTE-STACY: Yes, your Honor.

18 MR. GOLD: Yes, that's right.

19 THE COURT: And what year was that in? So what was
20 the 2009 trial?

21 MR. GOLD: There were two 2009 trials, one in
22 February.

23 THE COURT: Which is whose?

24 MR. GOLD: And that's ours.

25 THE COURT: Yes, right, that's what I have down.

1 MR. GOLD: And that's February, 2009.

2 THE COURT: Yes.

3 MR. GOLD: She also testified in the May, 2009 trial
4 of United States v. Wayne Hunt. That's the second man who was
5 committed, Jeffrey Shields and Wayne Hunt.

6 THE COURT: And was Hunt also in front of Judge Tauro?

7 MR. GOLD: That was also a Tauro trial.

8 THE COURT: I see. So when you're all referring to
9 the Tauro trial, there are two Tauro trials?

10 MR. GOLD: There are two Tauro trials, yes.

11 THE COURT: Okay, so --

12 THE WITNESS: And I did different Static-99
13 calculations for the probabilities of reoffense in each of
14 those trials. In this trial, previous trial of Mr. Carta, I
15 used the original Static-99. I had the original probabilities
16 of sexual reoffense for five, ten, and fifteen years,
17 39 percent, 45 percent in ten years, and 52 percent in fifteen
18 years. That does not --

19 THE COURT: That's what you told Judge Tauro in
20 February of 2009?

21 THE WITNESS: Right, for the case of Mr. Carta.
22 Those, of course, don't apply directly to Mr. Carta, but that
23 is the probabilities of reoffense for the original study
24 sample.

25 THE COURT: Right.

1 THE WITNESS: Now, there was another validation in
2 2008 where 18 new samples were collected from international
3 samples, combined together, and the Static-99 was validated on
4 those 18 samples. And what we found is -- those samples are
5 newer -- we found --

6 THE COURT: That's what you used for Hunt, or you're
7 using here?

8 THE WITNESS: That's what I used for Mr. Hunt because
9 those had been released for Mr. Hunt but had not been released
10 for Mr. Carta.

11 THE COURT: All right, but they're irrelevant to me
12 right now? Is that wrong?

13 THE WITNESS: They are irrelevant to you right now,
14 that's correct. They're no longer used.

15 THE COURT: Because they're no longer used?

16 THE WITNESS: Because in 2009 the validation was
17 completed with a total of 23 samples, and it's those absolute
18 probabilities of sexual reoffense that we use today.

19 THE COURT: Do you agree?

20 MR. GOLD: No.

21 Q. In fact in 2008 at ATSA -- this is an annual fall
22 conference. They always come out with a new development. So
23 there were the two samples. So actually just to correct the
24 record, Dr. Phenix --

25 THE COURT: Well, you can't testify. Ask her about

1 it.

2 Q. Dr. Phenix, I've put up on the screen your testimony from
3 February 10, 2009.

4 THE COURT: This is the what trial?

5 Q. And this is in United States v. Carta. And there you
6 testified that Mr. Carta had a 6 on the Static-99?

7 A. Uh-huh.

8 Q. And you were asked on direct examination what that score
9 meant, and you said, "There are probabilities associated with a
10 risk of 6. They have changed since my original evaluation to
11 the current range of risk for a score of 6, and there are
12 estimates for five years and estimates for ten years." And
13 then you reported that range. Do you see that?

14 A. That's right. That's the 2008 ATSA release of the
15 validation of 18 samples that I was referring to just now.

16 Q. Oh, okay, I'm sorry. I thought you told the Court that
17 you had reported the original samples to the Court, to
18 Judge Tauro.

19 MS. SERAFYN: Your Honor, I just want to object
20 because the First Circuit remanded this so that we could do
21 this again, and it seems like we're just reliving the first
22 trial and rereading those transcripts. I'm not sure how that's
23 relevant to --

24 THE COURT: Well, it might be relevant to credibility,
25 but I just have to understand it because I got so lost in the

1 Hunt trial.

2 MR. GOLD: Right, and I'm sorry. That was just a
3 convenient citation that she had changed her method and changed
4 back from pure actuarial to clinical actuarial, but she
5 actually testifies to the same effect here.

6 Q. In the original Carta trial, you reported a range for the
7 Static-99 score of 6, right?

8 A. Excuse me. I'm going to refresh my memory.

9 THE COURT: Well, what was just up on the screen is
10 different from what you just told me.

11 THE WITNESS: Okay, referring to Page 29 of my
12 original report for Mr. Carta, I report the original
13 probabilities for the Static-99. I do not use -- did not use
14 the 2008 validation release at ATSA.

15 THE COURT: So what did you say the range was in the
16 original Carta trial?

17 THE WITNESS: The original Carta trial was a
18 probability of sexual reconviction in five years of 39 percent,
19 in ten years of 45 percent, and in fifteen years of 52 percent.

20 THE COURT: So what did I just see up on the screen?
21 What is the 13 to 27?

22 THE WITNESS: Okay, this is the Hunt.

23 THE COURT: Oh, this is Hunt.

24 MR. GOLD: No, this is not Hunt. I'm going to -- I
25 think this is just -- we're also --

1 THE WITNESS: But my report reflects the original
2 probabilities. Now, whether I --

3 THE COURT: So that's Carta?

4 THE WITNESS: For Mr. Carta. So I don't remember --
5 Q. Well, that's right, because the report came out in 2008
6 prior to ATSA, right? It's July, 2008, that your report is
7 dated?

8 A. My evaluation is dated September 14, 2008.

9 Q. September of 2008?

10 A. And so ATSA was in October.

11 Q. Right. And you testified in the Carta trial in February
12 of 2009?

13 A. Uhm, I don't know.

14 THE COURT: Is it possible you readjusted again for
15 the new data?

16 THE WITNESS: It's very possible, but it's very hard
17 to remember, so --

18 THE COURT: I agree with you. I'm right there. It's
19 hard for me to remember things too, but I'm just trying to get
20 it right. So could you flip up that, if you still have that,
21 Mr. Gold.

22 Q. So right now we are looking, I have up for the record on
23 the document viewer transcript from day two of the jury-waived
24 trial in front of Judge Tauro.

25 THE COURT: It's hard for her. Do you have the

1 transcript so she can actually see the transcript.

2 THE WITNESS: I can see now that this is his name and
3 this is his transcript rather than the Hunt transcript. I
4 confused myself with that. So it appears that counsel is
5 correct that I used the new validation from 2008, 2008 release
6 at ATSA.

7 THE COURT: So if you updated it, it meant within --
8 you gave a range of 13 to 27 percent.

9 THE WITNESS: That's right.

10 THE COURT: And then you gave a --

11 MR. GOLD: Those are five- and ten-year ranges.

12 THE COURT: 16 to 37 would be in ten, right?

13 THE WITNESS: In the ten-year, yes.

14 THE COURT: So that's dramatically less.

15 THE WITNESS: Yes. What they found in the original
16 revalidation of the 18 samples was that when you use
17 contemporary samples, those that were released from
18 institutions and prisons in the '80s and '90s rather than the
19 '60s and '70s, that recidivism rates dropped significantly.
20 And that's why the new validation was released because --

21 THE COURT: Now, when you say "new," is that the new
22 before the last trial or the new before this trial?

23 THE WITNESS: This new one right before this --
24 Mr. Carta's trial was --

25 THE COURT: The first trial?

1 THE WITNESS: Yes. About three months before his
2 trial, the validation was released. And in 2008 at the
3 Association for Treatment of Sexual Abusers, these new
4 probabilities were -- we were advised to use these new
5 probabilities of sexual reoffense that were lower than the
6 original probabilities that I actually have in my report for
7 Mr. Carta from my first evaluation.

8 THE COURT: Okay, so the correct ones would be these
9 ranges?

10 THE WITNESS: At the time.

11 MR. GOLD: Well, we're getting there, Judge.

12 Q. But in February of 2009 --

13 THE COURT: I just needed to understand historically.

14 MR. GOLD: Right.

15 Q. In February, 2009, you testified under oath that those
16 were the best ranges; that was the risk that the actuarial
17 instrument was telling you, right?

18 A. I did, and that was true.

19 THE COURT: Trial transcript, what page were you on in
20 case I want to go find that again?

21 MS. SERAFYN: I think it was Page 16.

22 THE COURT: 16?

23 MS. SERAFYN: Of day two.

24 THE COURT: Thank you.

25 MR. GOLD: Page 16 of day two, yes.

1 THE COURT: Perfect. Thank you.

2 Q. And turning your attention to Page 42 of the same
3 transcript, this is February of 2009. So you were
4 characterizing the method that you were using to assess risk, a
5 pure actuarial method, during the Tauro Carta trial as well?

6 A. That's right, because I did not adjust the overall risk
7 for the dynamic factors, even though I considered them.

8 Q. And that's right, and so what you were testifying to in
9 that case was that the Static-99 gave you a range of risk,
10 right?

11 A. Yes.

12 Q. And the dynamic factors allowed you to adjust within that
13 range?

14 A. Right.

15 Q. But the pure actuarial method, which based on those
16 research studies at the time you thought was most accurate,
17 didn't allow you to use those to adjust above that range that
18 you gave?

19 A. Right, generally, yes.

20 THE COURT: So today, now the recommendation is just
21 to have an absolute number rather than a range?

22 THE WITNESS: Correct.

23 THE COURT: So when you gave the absolute numbers
24 yesterday, they fell within the second range but not the first
25 one? Is that right? I just want to understand. You said

1 under Hanson and Thornton under the 99-R, it was 35.5 percent
2 in ten years, which falls within that range, and 25.2 percent
3 within five years, right?

4 THE WITNESS: That's correct.

5 THE COURT: Sort of roughly similar for the 2002-R?

6 THE WITNESS: That's right, almost identical.

7 THE COURT: But you don't give ranges anymore?

8 THE WITNESS: No.

9 THE COURT: And what's the reason for that?

10 THE WITNESS: Because they found -- identified four
11 different sample types, and you now choose the correct sample
12 type, the one that is most similar to the person you're
13 evaluating.

14 THE COURT: So help me. What does that mean?

15 THE WITNESS: What it means is that they found that
16 factors outside of the actuarial instrument affected base rates
17 or rates of sexual reoffense.

18 THE COURT: Like what?

19 THE WITNESS: Like, has someone been preselected for
20 treatment? Most jurisdictions and prisons will choose the top
21 twenty to thirty, the most risky twenty to thirty, most high-
22 risk offenders to participate in treatment because they can't
23 afford to provide treatment to all of the offenders in the
24 prison, nor do all of them need sex offender treatment.

25 So when an individual is preselected for treatment,

1 what they found is that that person had higher base rates than
2 someone who had not been preselected for treatment. And that
3 makes sense because if someone's being -- if the riskiest
4 offenders are being placed into sex offender treatment, their
5 base rates or reoffense rates are higher than just an average
6 inmate who committed a sex offense who was not referred to
7 treatment.

8 THE COURT: So it involves discretion on your part as
9 to which of the four bins you put someone in?

10 THE WITNESS: That's right.

11 THE COURT: And which bin did you put Mr. Carta in?

12 THE WITNESS: I put him in the high-risk bin. What
13 we've also found out through new research is that these base
14 rates vary, and what is accounting for the differences in
15 reoffense rates in groups of sex offenders is the presence of
16 what we call "needs," high needs, or the presence of a lot of
17 dynamic risk factors. So what we now know is that it's really
18 primarily the presence of dynamic risk factors that are
19 affecting different reoffense rates. So if you use the
20 high-risk sample type, which I did, you would use that for an
21 individual who scored in the high range on the instrument that
22 I did not testify about yesterday, or has essentially all of
23 the dynamic risk factors present on the Stable-2000 that I did
24 testify about yesterday.

25 So if a person has a strong presence of those dynamic

1 risk factors, then you choose the high-risk sample. If the
2 person has been preselected for treatment, you could choose the
3 preselected-for-treatment sample --

4 THE COURT: What are the other samples?

5 THE WITNESS: The other sample is a --

6 THE COURT: There are four of them?

7 THE WITNESS: There's four. One is simply a
8 combination of preselected for treatment and high-risk needs,
9 so if you're unclear, you can use that. But the three primary
10 samples are routine, preselected for treatment, and high-risk
11 needs sample. Those are the three. And the probabilities --

12 THE COURT: So why aren't they the same thing? If
13 you're preselected for treatment under the thing you just told
14 me about, then it's because they're high risk.

15 THE WITNESS: If you're preselected for treatment,
16 you're higher risk than the routine sample. And if you have
17 the presence of many dynamic risk factors or all of the dynamic
18 risk factors, then you're higher risk than preselected for
19 treatment.

20 THE COURT: So what are the dynamic risk factors you
21 used to put him in the high risk?

22 THE WITNESS: And I testified to those. Intimacy
23 deficit --

24 THE COURT: Yes, but I didn't understand it. When I
25 did this with -- was it Mr. Shields? Probably, and maybe

1 Mr. Wetmore. Like you, they're all starting to blend. But
2 basically the dynamic risk factors were things you considered
3 after you did -- you know, you did the -- like you did the
4 first time around here.

5 THE WITNESS: Correct.

6 THE COURT: You adjust -- I did or people did the
7 clinically adjusted actuarial risk. So you did the basic --
8 there was no discretion. It was like sentencing -- no. It was
9 like, you know, it was a checkoff like your IRS forms. This is
10 what you did. It was literally mathematical. You know, did he
11 have so many convictions? Did he -- maybe not age back then, I
12 don't remember, but there were various factors, was it with a
13 male? And you added it all up, and there was no discretion,
14 and then you started thinking about these dynamic risk factors.

15 Here, that's not the case because the very range or
16 percentage involved discretion to put him there, right?

17 THE WITNESS: Well, I actually considered -- I scored
18 the actuarial instruments. That's all empirical, it's all
19 mathematical. But then I'd review all the dynamic risk
20 factors, which I had said in this case for Mr. Carta remain
21 present, all of them for him. That means that he has high
22 needs. We call that high needs, needs to be treated.

23 MR. GOLD: Your Honor, could I just ask?

24 THE COURT: Yes.

25 Q. When you say "we" in that context, who are you referring

1 to in particular or specifically?

2 A. I'm referring to Dr. Hanson and my colleagues who I work
3 with in this capacity. I'm part of the Static-99 development
4 team.

5 THE COURT: Well, just out of curiosity, if we put him
6 in another bin, does the statistics change?

7 THE WITNESS: Yes.

8 MR. GOLD: Your Honor, could I ask some questions?

9 THE COURT: Yes, go ahead. You'll get there. Yes,
10 you probably understand it a lot better than I do.

11 MR. GOLD: Well, no, I think the Court is --

12 Q. Let me just start just to kind of wrap up some of what we
13 were just talking about, before Carta one, in 2008 we have the
14 two samples?

15 A. Yes.

16 Q. And you testified in 2009, pure actuarial. You reported a
17 range. You said the dynamic factors allowed you to adjust
18 within the range, right?

19 A. Right.

20 Q. And then you -- and I guess you mean you and the Static-99
21 development team -- made a new presentation at a new ATSA in
22 2009, right?

23 A. Yes.

24 Q. And that was when this notion of dividing up samples into
25 four different groups was first introduced, right?

1 A. Yes. I introduced it at ATSA.

2 Q. You introduced it with your colleagues that you just
3 mentioned, right?

4 A. Right.

5 Q. And that has remained -- there was an ATSA also in 2010, I
6 suppose, but that's still the recommendation, to break up these
7 samples, right?

8 A. Yes, to have four samples. There are still four samples,
9 and it is recommended to choose one of them.

10 Q. And, now, in your report you go through all in really very
11 fine detail these different samples and this process that we're
12 talking about right now, right, in the report that you just
13 submitted --

14 A. Yes.

15 Q. -- dated November 18?

16 A. Yes.

17 Q. And there you chose the high-risk sample, right --

18 A. Right.

19 Q. -- to compare Mr. Carta to?

20 A. Yes.

21 Q. Right. Now, this comparison -- and the Court asked
22 whether there was discretion involved. Has that comparison
23 been tested in any peer-reviewed type literature, the process
24 of placing individuals into these or comparing them to
25 particular groups of samples?

1 A. No.

2 Q. Has even the very notion of not comparing someone to the
3 overall sample been subjected or proposed in a peer-reviewed
4 journal?

5 A. Well, there's peer-reviewed, you know, articles on
6 Static-99 demonstrating the variability and base rates and the
7 need to consider that variability.

8 Q. But isn't it a common concept in statistics that the
9 larger the number that you have, the more reliable your
10 results, right?

11 A. Generally, yes.

12 Q. Generally that's true. And in fact when the first split
13 of samples was announced, one of the advantages that was touted
14 for the new Static-99 was the size of the sample? The number
15 of bodies had become a lot larger, right, about 6,000
16 individuals, right?

17 A. Right, 8,000, yes.

18 Q. Eight thousand individuals?

19 A. Right.

20 Q. And that was at least thought at the time to increase our
21 confidence in those numbers because we had larger numbers of
22 individuals, right?

23 A. Well, we think that today, yes.

24 Q. Well, but today what we're proposing in breaking up these
25 samples, you have now broken them up again into much smaller

1 groups of individuals, right?

2 A. Because the sample is so large, you have the capacity to
3 break them up into groups and still have meaningful
4 probabilities. If you lump them all together, you will never
5 identify a high-risk sex offender from a low-risk sex offender
6 because it waters down those high base rate samples. So it's
7 important that you identify individuals who are higher risk and
8 individuals who are lower risk so we can appropriately manage
9 them.

10 Q. But isn't that what the Static-99 scores do?

11 A. The Static-99 cutoff score is -- can -- relative risk does
12 that, relative risk, but the probabilities of sexual reoffense
13 vary. So you can have a person with a score of 6 on Static-99,
14 and one person will have a reoffense rate of 15 percent while
15 another will have a reoffense rate similar to 50 percent. So
16 the cutoff score --

17 Q. Well, but individuals don't have their own reoffense
18 rate --

19 MS. SERAFYN: Can the witness finish her answer?

20 MR. GOLD: Oh, I'm sorry.

21 A. So the cutoff score is one issue. There will be higher
22 risk associated with a higher cutoff score. But there are
23 individuals with higher cutoff scores that have very different
24 base rates of reoffense, and we must identify, if we can, those
25 individuals with high cutoff scores and high base rates of

1 reoffense to appropriately manage them; and if you average all
2 of the samples together into one big routine sample, you will
3 not identify those individuals. And so this method will help
4 us to know who are truly the high base rate sample offenders.

5 THE COURT: You calculated risk based on which
6 instrument?

7 THE WITNESS: Static-99R.

8 THE COURT: And that came out in 2009?

9 THE WITNESS: The new probabilities of reoffense on
10 the entire sample of 23 came out in 2009, were released.

11 THE COURT: Has anyone done a Daubert hearing on it?

12 THE WITNESS: Uhm --

13 THE COURT: To your knowledge?

14 THE WITNESS: Yes. There's a Daubert hearing actually
15 on the Static-99R that will be next month?

16 THE COURT: Before whom?

17 THE WITNESS: Next month will be the first one.

18 THE COURT: Before?

19 THE WITNESS: In New Hampshire. Counsel is here in
20 our audience. The judge?

21 THE COURT: So was it peer reviewed anywhere, these
22 new bins?

23 THE WITNESS: Oh, the article on Static-99R has been
24 peer reviewed. It's not yet out, but it's been peer reviewed.
25 The probabilities --

1 Q. Can we have some more information about that? Something
2 has been peer reviewed but has not been published?

3 A. Right. It takes two years to get an article published.
4 But they have submitted articles. I don't have them off the
5 top of my head. I could certainly get the information for you,
6 but I don't have the articles that have been submitted. But
7 the development of the Static-99R article has been submitted
8 and it has been peer reviewed, according to the authors.

9 THE COURT: What is the last test that has been peer
10 reviewed and is published and is commonly used? Would that
11 just be the basic Static-99 or the range one?

12 THE WITNESS: The authors have recommended not to use
13 the Static-99 anymore because the probabilities of sexual
14 reoffense are too high.

15 THE COURT: So it's the next one?

16 THE WITNESS: So it's the Static-99R.

17 THE COURT: But with the old criteria that creates the
18 range, was that peer reviewed?

19 THE WITNESS: The peer review is simply the
20 development of the instrument. That's what they peer review.
21 They don't peer review the probabilities. Those are simply a
22 mathematical calculation that results from the sample type that
23 you use.

24 THE COURT: Here's my problem, all right? It keeps
25 changing.

1 THE WITNESS: It does. It has.

2 THE COURT: And so from a judge's point of view, I
3 don't know enough about it. The original one had a certain
4 appeal because there was no discretion. It just was math.

5 THE WITNESS: I agree.

6 THE COURT: And then I could adjust up and down based
7 on characteristics, whether it was alcohol or age, whatever. I
8 could adjust. And now you've got this brand-new thing that
9 hasn't yet come out, and I don't know its validity, and we
10 haven't had a Daubert hearing. So you may be right or you may
11 be wrong. It's just brand-new. Right?

12 THE WITNESS: Yes, the validity has been established.
13 The article --

14 THE COURT: By who?

15 THE WITNESS: By the authors of the instrument. So
16 Hanson and Helmus and Thornton have written the article on the
17 development of the instrument. It predicts with moderate
18 predictive accuracy and almost identically to the Static-99.
19 The advantage is that it accounts for age. That article has
20 been written, but the way we interpret the instrument is new
21 indeed. The instrument has only one minor change with the age
22 item, but the way we interpret it is different. But that
23 generally isn't subject to peer review. It's the development
24 of the instrument and the validity of the instrument that is
25 subject to --

1 THE COURT: But it can't be like, you know, pulling a
2 rabbit out of a hat. I need to be able to evaluate myself
3 whether or not I think it's reliable and whether or not the
4 factors you used are reliable, so I need to be -- I guess I'm
5 just not going to rubber-stamp it.

6 THE WITNESS: Right. I think one consideration for
7 the Court is that the relative risk is unchanged for the
8 instrument.

9 THE COURT: That is comforting, I'll grant you that.
10 It hasn't changed very much. I mean, it's less than 50 percent
11 in five years no matter which you use, right? Or actually less
12 than 50 percent in ten years.

13 THE WITNESS: Actually the scores, the probabilities
14 of reoffense go up with each cutoff score up to, like, a score
15 of 10. So the probabilities can go well over 50 percent for
16 certain offenders.

17 MR. GOLD: Oh, your Honor, can we actually isolate
18 this point? I just want to ask a couple of questions.

19 Q. So now with the larger number of bodies, you actually get
20 reliable recidivism rates for scores of 6, 7, 8, 9, and 10?

21 A. Right.

22 Q. Is that right? Is that what you just testified to?

23 A. Right.

24 Q. So previously, as the Court is familiar, the Static-99,
25 6 and above is all the same, but now you're getting reliable

1 results for an 8 or a 9, and those are higher, right?

2 A. Right.

3 Q. And I put up on the screen a table that I made, and it has
4 some of the information that we were just talking about and
5 that you talk about in your report. Now, do you see a table
6 there where I have it entitled "Score of 5 on Static-99R"?
7 That's called "Moderate high," right?

8 A. Yes.

9 Q. And the probability associated with the routine sample
10 you'll agree with me is 11.4 percent recidivism in five years?

11 A. I'm sure it is. I would have to see the table but --

12 Q. Do you have the table?

13 A. I actually don't have it with me, but, you know, I would
14 need to check it.

15 Q. Well, would you accept that from me?

16 A. Yes, it looks accurate to me.

17 Q. And the treatment need group is 15.9 percent over five
18 years?

19 A. Right.

20 Q. High risk, which is what you compared Mr. Carta to, and
21 the only number that you reported in your testimony yesterday
22 and in your report is 25.2 percent?

23 A. Right. I think that's the correct one.

24 Q. And then the non-routine I believe is a combination of
25 treatment need and high risk?

1 A. Correct.

2 Q. And that affords a 19.6 recidivism rate?

3 A. Yes.

4 Q. So the decision as to whether to compare someone to a
5 particular group has assumed a certain importance in
6 interpreting the Static-99 score, right?

7 A. That's right.

8 Q. And I believe your testimony is, that decision has not or
9 is not even capable of being subject to peer review?

10 A. Uhm, certainly making decisions like that, you could test
11 it. You could, for example, do an inter-rater reliability
12 study: How well do I do it compared to other people? Do we do
13 it in the same way? Do we do it in a different way? You can
14 always design a study to look at those kinds of things.

15 I was talking about the paper that was submitted for peer
16 review, and that paper simply examines the methodology in
17 developing the instrument and validating the instrument.

18 Q. But it doesn't talk about this process or validating this
19 process of comparing individuals to particular risk groups?

20 A. It does not address choosing a sample type, and I guess
21 that's the clearest way to say it.

22 Q. And just for the Court's reference, this was the range
23 that you reported in your testimony of 13.4 to 27.7 in February
24 of 2009, and then the five-year risk rate from the original
25 samples is actually 39 percent?

1 A. Right.

2 Q. Now, you have a website, and you're one of the developers
3 of the Static-99. Is that a fair statement?

4 A. No. I didn't develop it. I just wrote the coding rules.

5 Q. Oh, and that was that 15-page document that we talked
6 about, and that was later expanded in 2003 to the coding rules
7 that are in common use?

8 A. That's right, and that's authored by Andrew Harris.

9 Q. But now you are on the website for something called the
10 Static-99 Clearinghouse, right?

11 A. Clearinghouse? I think it's just Static99.org.

12 Q. This isn't the clearest, but this is just an image of the
13 Static99.org website that you just referred to?

14 A. Right.

15 Q. And there is a picture of you and Dr. Hanson on the
16 website?

17 A. Right.

18 Q. And it's called the Static-99 Clearinghouse there but
19 probably not in the address line. You have information for
20 people scoring the Static-99 nationwide on this website, right?

21 A. That's right.

22 Q. And in fact you post things like legal decisions on the
23 website, right?

24 A. Yes.

25 Q. And there have been hearings about this process that we

1 have been talking about ongoing in the state of New Hampshire
2 in which you participated, right?

3 A. Yes.

4 Q. And one of those cases is the State v. Hurley?

5 A. Right.

6 Q. Thomas Hurley?

7 A. Yes.

8 Q. And there was actually a Daubert ruling about what we're
9 talking about right now in that case, right?

10 A. Yes.

11 Q. And you're familiar with it because you post it on your
12 website, right?

13 A. Well, and I testified in it, yes.

14 Q. And you testified in it. And the court ruling in that
15 case, in the Hurley case, is that the only sample that is
16 admissible for interpretation of Static-99 scores is in fact
17 the routine sample, right?

18 A. Right.

19 Q. And that was based in part on a finding that the choice of
20 high- and low-risk samples was based on post hoc logical
21 inference, right? That's the phrase that the court used?

22 A. Yes.

23 THE COURT: Which means what?

24 MR. GOLD: That it was -- you're asking --

25 THE COURT: This is in his opinion?

1 MR. GOLD: This is in the opinion, yes. So I think
2 it's an opinion that we've already submitted in some briefing
3 to the Court, but --

4 THE COURT: Yes, I think you did on Friday. Has any
5 Federal Court looked at this?

6 THE WITNESS: No.

7 THE COURT: So could you go through exactly again why
8 you put him in the high-risk/high-needs bin? I was actually
9 reading your report as you were being examined, and it doesn't
10 state why.

11 THE WITNESS: I do have it in my report, your Honor,
12 if you want me to point it out.

13 MS. SERAFYN: I was just going to mention, your Honor,
14 that, I mean, I believe what she uses to decide which bin is
15 the SRA: FV, which is the instrument that --

16 THE COURT: Yes, but she said she could explain it
17 based on the earlier Stable. Is that true or not?

18 THE WITNESS: Yes, I can explain it based on that.

19 MR. GOLD: But, your Honor, you know, I don't want to
20 upset the apple cart here, but I think that it might -- I kind
21 of want to have my cake and eat it too, but if she wants to
22 talk about what she did without admitting --

23 THE COURT: Well, unfortunately, you all raised all of
24 these issues on Thursday and Friday, but I'm starting to
25 understand it a whole lot better. We're going to finish with

1 her today, and then I'll figure out what to do.

2 Right now, I need to know why you put him in this
3 incredibly -- this high bin with someone who's -- what did you
4 consider in putting him in this bin? What are the factors?

5 THE WITNESS: I considered the presence of the dynamic
6 risk factors outside the instrument. You pick a bin based on
7 factors outside.

8 THE COURT: Right. Where are they?

9 THE WITNESS: It would be the factors on this -- in
10 this case today -- when I wrote my report, it was the SRA. It
11 was the new instrument.

12 THE COURT: Yes, but what are the factors, like
13 alcohol?

14 THE WITNESS: The factors are intimacy deficits,
15 including -- let's see, if you turn to --

16 THE COURT: I remember, you described those yesterday.
17 I'm just trying to get through. So it was the intimacy
18 deficits.

19 THE WITNESS: Yes. They're on Page 32 of my original
20 report: significant social influences, and all the factors
21 under intimacy deficits, like relationship with partners,
22 emotional identification with children, hostility toward women,
23 feelings of loneliness and social rejection, and lack of
24 concern for others; also factors having to do with sexual
25 self-regulation, sex drive, high sex drive and sexual

1 preoccupation; turning to deviant sex when you feel
2 overwhelmed, having a history of deviant sexual arousal; also
3 cooperation with supervision; and then factors having to do
4 with general self-regulation, behavioral impulsivity;
5 problem-solving, being able to make good decisions and follow
6 through with those and think of the consequences.

7 THE COURT: Okay, so you went through those yesterday.
8 I just didn't understand that's what went into the bin you
9 chose, if I'm now understanding this. But that involves
10 judgment on your part?

11 THE WITNESS: It involves a clinical evaluation of
12 whether those factors are present or not for an individual
13 case.

14 THE COURT: Right, but it's not like math like the
15 pure actuarial, right?

16 THE WITNESS: Not at all.

17 THE COURT: You're making a judgment call, right?

18 THE WITNESS: Absolutely. I'm deciding whether that
19 is a risk factor for him or not.

20 THE COURT: Not just whether it's a risk factor. It's
21 which bin you go into.

22 THE WITNESS: Right, and the bin, if he had low needs,
23 few of these factors, you would choose the routine sample.

24 THE COURT: Right, but it's not math the way --

25 THE WITNESS: Right.

1 THE COURT: I mean, it's just, you know, like, you
2 could be a second-grader and fill in the actuarial tables that
3 are pure, right?

4 THE WITNESS: Right.

5 THE COURT: So this involves your judgment as a
6 psychologist, right?

7 THE WITNESS: It definitely does.

8 THE COURT: It's not like adding up, tallying zeros
9 and ones, right?

10 THE WITNESS: No. It involves my judgment on the
11 strength of the presence of these factors.

12 THE COURT: Okay, and so by definition almost, it's
13 person-specific rather than something that can be validated.
14 Is that what you were trying to tell me before?

15 THE WITNESS: Absolutely person-specific.

16 THE COURT: So you can't be validated in terms of
17 which bin he falls into.

18 THE WITNESS: The method of choosing the bin is not
19 validated. The instrument is validated. I guess I was
20 confusing you in that way. The instrument has moderate
21 predictive accuracy, ROC of .72, but it's not -- the method of
22 choosing the bin is based on the presence of needs. That is
23 not validated. There is a mathematical way to do that now --

24 THE COURT: I got it, I got it.

25 THE WITNESS: -- but I couldn't use that.

1 MR. GOLD: I think there's more to it. I mean, I have
2 to ask a couple of questions about it.

3 THE COURT: Fine.

4 Q. The idea of breaking up samples in the first place, has
5 that been validated?

6 A. No. It was a judgment by the researchers to divide the
7 samples up because of the varying base rates.

8 Q. And that was the same judgment that the Court disagreed
9 with in the Hurley case that we were just talking about, right?

10 A. I would say so, yes.

11 Q. And one of the things you do that we spoke about is, you
12 do testimony in cases like this, and you also give
13 presentations about these instruments, right?

14 A. Yes.

15 Q. And you were informed before testimony yesterday that an
16 instrument that you had recently started using you couldn't
17 talk about because of a court ruling, right?

18 A. Because of -- yes, this Court ruling, yes.

19 Q. Right. So what you were just talking about was using
20 these factors as a justification for putting people in
21 different bins, right?

22 A. Right.

23 Q. And the instrument that you weren't allowed to testify
24 about was a method of mechanizing that process, right, or
25 making that process mechanical, right?

1 MS. SERAFYN: Your Honor, I have to object. We
2 weren't allowed to bring this out on direct, and now it seems
3 like he's trying to --

4 THE COURT: Do you want to open --

5 MR. GOLD: Well, I'm opening it up, your Honor,
6 because I just think it goes to, you know, credibility. I
7 mean, I --

8 THE COURT: Fine.

9 MS. SERAFYN: Just having said that, she has a flight
10 this afternoon. We weren't allowed to ask her about this on
11 direct, so I want an opportunity to be able to ask her about
12 this instrument that he's now opened the door to before she
13 leaves today.

14 THE COURT: He'll finish by 12:30, and then you'll
15 have time.

16 Q. But that instrument, the purpose of that instrument was to
17 mechanize this process, right?

18 A. Yes.

19 Q. And in fact there was a training about that instrument for
20 use in this process December 1, right, December 1 and 2?

21 A. 2 and 3, I think.

22 Q. Right. And is it a fair statement to say that the
23 development of that instrument for that purpose was in response
24 to criticism about the clinical judgment involved in this
25 process that we're just talking about?

1 A. I don't know that it was in response to criticism. It's
2 been in the development stage for quite a while and --

3 Q. Well, it can't have been in the development stage for
4 before this whole process of breaking up the samples began,
5 right?

6 A. You know, Dr. Thornton would have to answer that. I,
7 frankly, don't know.

8 Q. You don't know?

9 A. I don't know his motivation other than the fact that it
10 makes this procedure more precise. If it was in response to
11 criticism or when he actually started the development, I just
12 don't know.

13 Q. Now, there are people in the routine sample, and we just
14 look at those low numbers, that have a 6 on the Static-99,
15 right?

16 A. Yes.

17 Q. And there are people in the low routine sample that have a
18 7, 8, and a 9, right?

19 A. Yes.

20 Q. Right. Now, by the way, when you reported the average of
21 all Static-99 scores -- do you recall that?

22 A. Yes.

23 Q. -- what was that average taken from, the routine sample?
24 That average score, you said the average score in the Static-99
25 was a 2, and he's a lot higher than a 2. Was that from the

1 routine sample?

2 A. I believe it was the routine sample, but I'm just not
3 positive. I just can't remember.

4 Q. And so the average for this high-risk sample, do you know
5 that?

6 A. No, I don't know.

7 Q. And the average for the old Static-99, that was 3.2,
8 right?

9 A. Yes.

10 THE COURT: Are courts still using the earlier
11 percentages you gave at the trial?

12 THE WITNESS: I don't know. Not in my cases, but I
13 just don't know.

14 THE COURT: Would that still be reliable in the field?

15 THE WITNESS: Oh, no. It would be an overestimate of
16 even the high-risk sample.

17 THE COURT: The 13 to 27 percent range?

18 THE WITNESS: Oh. Oh, those. No, those are
19 not valid. Those are based on the 18-sample validation. There
20 was a larger 23-sample validation, which is the current
21 probabilities. They should be used, the current probabilities
22 in the four sample types.

23 THE COURT: Were those other ranges peer reviewed and
24 validated?

25 THE WITNESS: The instrument was, and the validation

1 occurred, and those were the true probabilities of two separate
2 samples. How you chose the low risk from the high risk was not
3 validated.

4 THE COURT: And that's why you have a range?

5 THE WITNESS: We have a range because there was a
6 range in the sample, the two samples, between lower-risk
7 offenders and high-risk offenders. That's one of the
8 problems --

9 THE COURT: Yes, it's a big problem for the Court.
10 I'm trying to find something that's not evolving and dynamic.
11 I just want a methodology like I used the last time. So
12 suddenly you're telling me it's "throw it in the wastebasket
13 and start with a brand-new one" without any kind of oversight
14 on my part. So is it reliable to use the old 13 to 27, 16 to
15 37 percent range?

16 THE WITNESS: No.

17 THE COURT: Well, then we need to have a Daubert
18 hearing on this methodology.

19 MR. GOLD: We'd ask for that, your Honor.

20 THE COURT: I don't know how I can just --

21 MS. SERAFYN: I mean, your Honor, again, it just
22 seems -- and this is something I alluded to yesterday -- it
23 just seems that we're sort of being penalized for the fact that
24 we have the leading expert who relies on the most up-to-date
25 research.

1 THE COURT: You know what? Let me just say this:
2 It's likely that you're going to win on prongs one and two, but
3 I'm now on prong three. You know, you've won before the First
4 Circuit. It seems to be reaffirmed here. There's still debate
5 in these reports, but that's likely to be my conclusion. But I
6 need to be sure. This is a brand-new instrument that was just
7 training -- it's evolving as of about two weeks ago. I need to
8 understand it.

9 MS. SERAFYN: Your Honor, an alternative is something
10 that we suggested previously, which is, you could rely on the
11 record that was established during the first trial. We had
12 testimony about the third element.

13 THE COURT: She just told me it isn't reliable.

14 That's your opinion, right, the old numbers aren't
15 reliable?

16 THE WITNESS: The absolute probabilities are different
17 now, but the instrument is reliable and valid.

18 THE COURT: The old instrument?

19 THE WITNESS: Yes, yes.

20 THE COURT: So what did you just answer "no" to?

21 THE WITNESS: The probabilities. The instrument and
22 the scoring and the risk range, low, medium, to high, it's all
23 been validated. It's the process, that the clinician chooses
24 to use different absolute probabilities based on sample type.

25 THE COURT: Is it still valid to use the statistics

1 from the 18 sample?

2 THE WITNESS: No. It's been advised by the authors,
3 Hanson and Thornton, to use the newest validation that has a
4 total of 23.

5 THE COURT: Sure, I understand they want the newest
6 one used, but they're not sort of Zeus on Mount Olympus. Is it
7 still reliable to use the 18 samples that doesn't break these
8 into these four bins?

9 THE WITNESS: Uhm, it's not advised to use the range
10 from low risk to high risk.

11 THE COURT: Because these two guys don't advise?

12 THE WITNESS: Right. And it's their instrument, and
13 they advise that the most accurate procedure would be to choose
14 a sample type from the full validation of 23 samples. And so
15 that's what I do, do what the authors advise.

16 THE COURT: I understand that. You want to be
17 cutting-edge. I understand that, but I have to make sure it's
18 valid. So you'll finish up, and then I'll decide what to do
19 about this.

20 Q. In the Hurley case, you were across the aisle from a
21 statistician or a psychologist named Brian Abbott. Are you
22 aware of that?

23 A. Yes.

24 Q. And he's referenced in the decision that the court has in
25 the Hurley case, right?

1 A. He is.

2 Q. And if I'm mistaken, please let me know, but he
3 recommends, if you're going to use the instrument, to just
4 group all the bodies together, right?

5 A. Well, sure. Then there would be a lower probability of
6 sexual reoffense, which would have been advantageous to his
7 case.

8 Q. Well, he was testifying as a Daubert expert the same way
9 you were, right?

10 A. Yes, and he's only testified for the defense in any case
11 ever for sexually violent predator purposes.

12 Q. And so presumably he justified the recommendation to look
13 at the whole group by reference to some statistical principle,
14 right?

15 A. I don't recall what statistical principle he referenced.

16 Q. Well, I just as a layperson brought up this notion that if
17 you have a large number of bodies, you get reliable results,
18 right?

19 A. Uhm, yes.

20 Q. And you've agreed with me that that's generally true?

21 A. Generally true, but not in this case.

22 Q. So this --

23 A. You'll get erroneous results.

24 Q. -- that we're talking about is not that. It's something
25 else, right?

1 A. It looks beyond a mere average to find a method to
2 identify high-risk sex offenders. That's the whole purpose of
3 giving an actuarial instrument, to know who's high risk and
4 who's low risk. If you average all the samples, then you lose
5 the capacity to do that.

6 Q. Well, but what you're doing is in effect deciding he's
7 high risk and then scoring him on the instrument, right?
8 That's exactly what you're doing, right?

9 A. I did decide he was high risk after looking at his dynamic
10 risk factors and needs, of which he has all of them, which
11 means that his probability of reoffense will be greater than
12 the routine sample.

13 THE COURT: Well, would you have numbers if we just
14 wanted to average across the large number of samples, the 23
15 samples?

16 THE WITNESS: There would be probabilities similar to
17 what you see in the original Static-99 for five years, ten
18 years, and perhaps fifteen years. I don't know the followup
19 for all the studies, but --

20 THE COURT: So if you did it across the 23, he'd be at
21 39 percent and 45 percent and 52 percent?

22 THE WITNESS: Except that the new contemporary samples
23 have lower reoffense rates, so those probabilities -- if you
24 use the methodology that Dr. Abbott has proposed, then you
25 would have just one set of probabilities for five years and ten

1 years, and they would be significantly lower than the old
2 probabilities.

3 THE COURT: So would you be able to get those for me?

4 THE WITNESS: The averages?

5 THE COURT: Yes.

6 THE WITNESS: Sure.

7 THE COURT: Would you know them?

8 MR. GOLD: I think I can get them. I mean, I'd have
9 to talk about an expert about that. It's been done. I think
10 it's been done.

11 THE COURT: So that would be at least a way to think
12 about this, which is, if you averaged across all 23 samples,
13 here's your percentage; if you averaged with your prejudgment
14 that he's high risk, here's the average. And as a court, none
15 of this is a science. I mean, I'm only using this as one of
16 many factors in making my decision. This isn't like a litmus
17 test for me. I never have used it that way, so it would be
18 just one of the many things I thought about are these different
19 ways of thinking about it. I mean, you know that Mark Twain
20 quote, right?

21 THE WITNESS: Right.

22 THE COURT: "There's lies, damn lies, and statistics."
23 So, I mean, it would just be different goalposts, if you will.

24 THE WITNESS: Right. And another way as a clinician
25 to conceptualize that would be, let's say I did look at the

1 overall probabilities, I would know that it's lower than the
2 true probability of a true high-risk sex offender; and I would
3 consider Mr. Carta's risk to be significantly higher than those
4 23-sample average probabilities for a score of 5.

5 THE COURT: That's what we did before basically --

6 THE WITNESS: We did.

7 THE COURT: -- which is, you adjusted for dynamic risk
8 factors. You gave me a percentage in the past that was across
9 all populations, and as a Judge I exercise some judgment, just
10 like you as a psychologist exercise some judgment, but then
11 it's not prebuilt into the model.

12 THE WITNESS: Right, and that is how we did it before,
13 yes.

14 THE COURT: Okay.

15 Q. How do you know that these dynamic factors differentiate
16 between these four sample groups?

17 A. Because the incremental validity of the dynamic factors
18 has been established, well established, that it increases
19 predictive accuracy when you consider the dynamic factors as
20 well as with the static factors.

21 Q. Well, you're referring to research that -- first of all,
22 when you had abandoned the clinically adjusted actuarial
23 approach, it was based on Hanson's reporting of three research
24 studies that said that adding dynamic factors actually lowered
25 predictive accuracy, right?

1 A. Well, it said when the clinician considered dynamic risk
2 factors or the probation officer considered dynamic. Two of
3 the studies had probation officers, and one study had
4 psychologists in a prison; and when they considered other risk
5 factors, not just the dynamic risk factors, they considered a
6 lot of other factors, some of them extraneous to predicting
7 reoffense, that it lowered their predictive accuracy.

8 Q. Those three research studies influenced you, as we just
9 talked about, to say, "You know what, I'm not going to go above
10 these percentages. I'm a clinician. I need to give good
11 information to the Court. I want to be accurate, and this is
12 the top. The dynamic factors might put me toward the top, but
13 I don't want to degrade my predictive accuracy." That was your
14 position; is that fair?

15 A. That's right, based on those three studies.

16 Q. And now you've just referenced a study or just by
17 description that adding dynamic factors to an actuarial, I
18 suppose in some research sample, added incremental validity,
19 you called it?

20 A. Right, new information that increased predictive accuracy.

21 Q. Okay. But was that -- how many studies? How many?

22 A. Oh, there's been maybe six studies now.

23 Q. Six studies. When?

24 A. When? In the last -- well, the first one was a dynamic
25 supervision project by Hanson, which was the validation of the

1 Stable-2000.

2 Q. Okay, but, I mean, I don't want to get too bogged down in
3 the details, but for the purpose of separating out people into
4 these groups, has there been any validation study?

5 A. Uhm, a validation study, you mean a peer-reviewed
6 published study to look at the effect of dynamic risk factors?
7 Is that what I'm --

8 Q. Using these dynamic risk factors to -- for example, the
9 four groups weren't selected based on the presence or absence
10 of dynamic risk factors, were they? They were just selected
11 because they had higher or lower base rates, right?

12 A. Uhm, right. I'm sorry, they weren't selected on base
13 rates. They were selected on factors outside of the actuarial
14 instrument. So they found a sample that had been detained
15 because they were too dangerous, the high-risk sample, for
16 example. They had been detained in Canada and not released on
17 their release date because they were found to be too dangerous.
18 A large part of that sample is the old sexual psychopath
19 commitments that are just very similar to SVPs from the
20 Bridgewater sample in Massachusetts. So it was those factors:
21 that they had been detained, committed as sexual psychopaths,
22 detained for dangerousness. That is how that sample was
23 chosen, not by base rates. Base rates vary in every one of the
24 samples.

25 Q. Okay. Well, but the developers said there were some

1 groups that had naturally-occurring overall base rates that
2 were higher, right?

3 A. Well, there were, but they didn't choose them by base
4 rate. They choose them by characteristics. If they had been
5 preselected for treatment, they went into that sample type. If
6 they had been committed as a sexual psychopath or detained for
7 dangerousness, they went into the high-risk sample type. So
8 they were chosen by factors, not by base rates.

9 Q. And so you compared individuals to the factors that went
10 into those choices, right?

11 A. Yes.

12 Q. And did they use these dynamic factors to, for example,
13 the Stable-2007, to split up these groups?

14 A. Uhm, no. They used the other characteristics I just
15 described. But what they found after they divided them up,
16 because they had been preselected for treatment or because they
17 had been committed as a sexual psychopath, what they found is
18 that the reoffense rates could be explained, the higher
19 reoffense rates could be explained by the presence of higher
20 dynamic risk factors.

21 THE COURT: Well, were any of these -- I understand
22 how you picked, that makes sense to me, the Bridgewater group
23 and the Canadian group that were detained. Was there a group
24 that looked like Mr. Carta? In other words, he didn't fall
25 into any of those groups. Was there a group that was

1 preselected based on the various factors that you just told me
2 about and then decided what their base rates were?

3 THE WITNESS: Actually, Mr. Carta did resemble one of
4 the groups. He was preselected for treatment in SOTP, so he
5 could be compared to the preselected-for-treatment sample.
6 That would remove him from the routine sample just on the face
7 at the time that I originally --

8 THE COURT: Okay, fair enough. So what would his
9 reoffense rates be if he was just put in that sample?

10 THE WITNESS: I need the evaluator handbook. Do you
11 have it, Ian?

12 Q. I'm assuming that number would be 15.9, or, I'm sorry --
13 yes, preselected for treatment need, 15.9?

14 A. Right, and the ten-year is 22.6.

15 Q. Dr. Phenix, you give presentations. I'm showing you a
16 slide from one of the presentations that you provided us with.
17 Is this the composition of the preselected-for-treatment need
18 group?

19 A. No. It's the high risk.

20 Q. I'm sorry, I'm sorry. That's what I meant. The high
21 risk?

22 A. Yes, it is, yes.

23 Q. Okay. So you've got Denmark, Canada, Canada, Canada,
24 Canada, U.S.A., right, not in that order?

25 A. Right.

1 Q. Okay. Now, one of the things that you've been mentioning
2 about these new samples is that they're contemporary and
3 they're better, right, because they're contemporary, so they're
4 more applicable to decisions that we have to make in the
5 present time?

6 A. Yeah, they're all contemporary except Knight and Thornton
7 is the older sample. The other one, two, three, four, five are
8 more contemporary samples. They have lower base rates
9 generally.

10 Q. Right, the Denmark Canada, Canada, Canada, Canada are all
11 more recent, but I think the largest number of bodies here and
12 the highest reoffense rate is from the Bridgewater treatment
13 sample, right?

14 A. Right.

15 Q. People who were released from 1959 to 1984, right?

16 A. Yes.

17 THE COURT: Knight and Thornton is Bridgewater?

18 MR. GOLD: Knight and Thornton is Bridgewater, and
19 that is the Bridgewater sample.

20 Q. And so these are people who have actually been committed
21 as sexually dangerous persons and released, right?

22 A. Yes.

23 Q. So what is the justification for including this in a group
24 of samples when you're making contemporary decisions?

25 A. You'd have to ask the authors about that. I mean, I think

1 that they believe that the sample was representative with the
2 others and chose to use it, but you'd really need to consult
3 them about the final decision to do that.

4 Q. But you'll agree with me that the more contemporary a
5 sample is, that's a virtue, right?

6 A. Oh, I will agree, yes.

7 Q. And that that's a virtue that this sample doesn't have,
8 right?

9 A. Right, the Knight and Thornton sample is older.

10 Q. Now, after you went and discussed this, you discussed
11 characteristics of the various samples, and for context for the
12 Court, this is your instructions to evaluators in New Hampshire
13 about how to go about scoring your instrument, right?

14 A. Right. This is the New Hampshire presentation?

15 Q. Correct.

16 A. Yes, that's right.

17 Q. Yes. And so, for example, you tell them that the Haag
18 sample -- and that must be the Denmark sample -- the sample had
19 these factors?

20 THE COURT: This is the high risk?

21 Q. This is one of the samples in the high-risk overall
22 sample: "Patterns of persistent violence or sex behavior with
23 children, seriousness of current offense, info that offender
24 difficulty controlling violent sex offending, use of weapon,
25 and threats of violence." Those were all characteristics that

1 distinguished the group of men in the Haag sample, right?

2 A. Yes.

3 Q. You have all these factors, and these are factors that --
4 "availability of supervision, number of sex offenses involving
5 child, being likely to commit a sex offense against a child,"
6 I'm not sure how these cut, but you're telling the evaluators
7 that you're instructing that these are factors of the Haag
8 sample, right, so that they can know whether to compare their
9 individual to the high-risk sample, right?

10 A. Just to show them some of the characteristics of the
11 samples in the high-risk group.

12 Q. So the Bengston sample is also in there. In that sample
13 you had "report addressing insanity, psychiatric
14 recommendation," you had "severe sexual offenses," you had
15 "violent offenders," you had "mental illness, mental
16 retardation, formal psychiatric evaluation" in that sample,
17 right?

18 A. Yes.

19 Q. Now, distinguishing these samples -- and there your
20 overall here is "Offenders referred to intensive treatment
21 programs for the highest-risk offenders, such as sexually
22 violent predators, sexually dangerous persons." That's
23 something that describes the Bridgewater sample, right?

24 A. Yes.

25 Q. "Incompetent to stand trial, not guilty by reason of

1 insanity," and then "Offenders identified as high risk through
2 a quasi-judicial or administrative process resulting in
3 extended detention for dangerousness, preventive or indefinite
4 detention treatment orders, denial of statutory release."

5 These are factors that would make one put one in the high-risk
6 group, right?

7 A. Well, they may be similar to those individuals, yes, your
8 offender you're evaluating.

9 Q. And these are factors that don't help you identify
10 high-risk/high-need offender. This is in March of 2010. So
11 dropping out of treatment, that's not a factor that you should
12 use to distinguish someone?

13 A. Right. We don't know if that helps you choose a sample
14 type, so those are factors that people have used that should
15 not use to choose a sample type.

16 Q. And for the record, the record that the Court has
17 regarding Mr. Carta's participation in treatment, he in fact
18 withdrew, right?

19 A. He did drop out of treatment.

20 Q. He voluntarily dropped out, right?

21 A. Yes.

22 Q. Right. He wasn't terminated for misbehavior, right?

23 A. No, but it's the same increased risk whether you drop out
24 or get kicked out.

25 Q. Well, but just for clarification. And then he stated in

1 the record to his therapist he wanted to get back into
2 treatment but was too embarrassed because he had withdrawn in
3 such a noisy way, right? Do you recall that?

4 A. Yes, he did say that.

5 Q. So not treated is not a factor that justifies putting
6 someone in the high-risk group, right?

7 A. Right. These factors don't help you choose a sample type.
8 That does not mean they're not risk factors for future sexual
9 reoffense because they are.

10 Q. Right, but right now we're talking about your initial
11 decision to put Mr. Carta in the high-risk group, right?

12 A. Right.

13 Q. Antisocial behavior and preselection for evaluation as
14 SVP, the situation that Mr. Carta is in right now, look at the
15 procedure of reselection -- I'm not sure what that means -- but
16 these are all factors that don't help you decide to make that
17 initial determination?

18 A. That's right.

19 THE COURT: But let me just ask you, a lot of the
20 factors that you just gave me just now and yesterday fall in
21 the factors that don't help you?

22 THE WITNESS: Okay, to be clear, this slide pertains
23 to how you decide to choose a sample type, not decide if
24 they're a risk to reoffend, how you choose a sample type.

25 THE COURT: Right, right, but --

1 THE WITNESS: These characteristics are unknown about
2 the samples, so we can't use these to choose a sample, but we
3 can certainly use these factors to determine, if present, a
4 person's risk to reoffend, period, is higher because they are
5 clearly risk factors for sexual reoffense, but they don't help
6 you pick a sample type.

7 THE COURT: Yes, one of the bins.

8 THE WITNESS: Right.

9 THE COURT: So when you told me about the intimacy
10 deficits and the impulsiveness and all these various other
11 things, that did not help you pick the bin?

12 THE WITNESS: Those do. Those dynamic risk factors
13 that I identified do help you --

14 THE COURT: Isn't antisocial -- maybe I'm losing --

15 THE WITNESS: Antisocial behavior, so if a person
16 commits crimes, all right, which would be general antisocial
17 behavior, that does not help you decide if they're high risk,
18 preselected for treatment, or routine. However, if they have
19 high needs, the factors I gave you, if all of those are
20 present, that helps you select the high-risk/high-needs sample.

21 THE COURT: Is that in any of these lists?

22 THE WITNESS: No. Those dynamic risk factors are not
23 here on this list.

24 THE COURT: Are they in any of the lists we've looked
25 at?

1 THE WITNESS: They're on the Stable-2000.

2 THE COURT: But in this new method that you said we
3 just trained on and you're all learning about, that wasn't on
4 any of those lists you trained on the other day?

5 THE WITNESS: The SRA is the new instrument, and it
6 has similar, very similar factors to the Stable-2000.
7 Sexualized violence is probably the only real new and
8 grievances thinking, but the rest of them are very similar to
9 the factors on the Stable-2000 because they're both dynamic
10 risk instruments.

11 THE COURT: Just revisit my question, though. I
12 understand that it may have shown up a long time ago, but on
13 this most recent SRA that you trained on, did any of them
14 include the factors that you relied on in putting Mr. Carta in
15 the highest bin?

16 THE WITNESS: It included almost all of them, and none
17 of them were these.

18 THE COURT: Okay, so he's not giving you a complete
19 set of the factors you told the people to rely on?

20 THE WITNESS: I didn't -- we didn't have the SRA then,
21 so I couldn't tell them to rely on that. This training was a
22 year or two ago, something like that.

23 MR. GOLD: In March of 2010.

24 THE WITNESS: Yes. This was before the SRA was
25 available, or I would have told them that.

1 THE COURT: I see. So you're saying, in the most
2 recent December training, it does include those lists?

3 THE WITNESS: Right. Today I would tell them to use
4 that.

5 THE COURT: This is what I'm talking about, the
6 evolving. So did you give him what you showed people on
7 December 1?

8 THE WITNESS: Yes. I administered the dynamic risk
9 assessment instrument in this evaluation, and I trained them to
10 do the same thing.

11 THE COURT: I'm just trying to say, for him to be able
12 to represent his client, there are discovery requirements, and
13 I know he was just handed something yesterday. Did that
14 include the factors that you now use in putting someone in
15 bins?

16 THE WITNESS: The SRA?

17 MR. GOLD: The SRA coding rules.

18 THE WITNESS: Yes, it does.

19 MR. GOLD: Your Honor, we got the coding rules for the
20 instrument. I don't -- this is actually getting me a little
21 twisted up because what I want to ask the doctor is, this
22 splitting up into bins, which we object to in the first place,
23 that happens a year ago. Now, to justify putting people into
24 different bins, I think we've heard about two or three methods,
25 and this is the --

1 THE COURT: Right, the evolving answer, right, good
2 point. So when you put people into bins, how long ago was it?
3 A year ago? When is your report date? The updated report is
4 when?

5 THE WITNESS: That would be November 18, 2010.

6 THE COURT: At that point -- let's just freeze it at
7 that spot moment in time -- when you wrote this report, are
8 there published factors that helped you put it into bins?

9 THE WITNESS: Uhm, yes, there are dynamic risk factors
10 that help me put it into bins.

11 THE COURT: And did you give those to counsel or to
12 the government?

13 THE WITNESS: It's in my report.

14 MS. SERAFYN: Your Honor, so just for the time line,
15 her report is dated November 18. We got it shortly after that
16 and provided it to Mr. Gold. We heard nothing until last week.

17 THE COURT: Excuse me. This has all been two or three
18 weeks, including Thanksgiving, so, I mean, I'm not going to
19 hold him to that, so --

20 MS. SERAFYN: And I understand, but he didn't request
21 a deposition, he didn't request -- so when we say, your Honor,
22 that we gave it to him yesterday morning, Mr. Gold called me on
23 my cell phone Sunday night and asked for anything we had on the
24 SRA. I gave it to him first thing yesterday morning.

25 THE COURT: It's no longer what Mr. Gold needs. I

1 need it.

2 Were there published criteria for the factors you used
3 in putting him into bins at the time you did your updated
4 report?

5 THE WITNESS: Published, no. They're provided in the
6 training that you get on how to do this. The author of the
7 instrument, Dr. Thornton, has --

8 THE COURT: Okay, so did he have handouts?

9 THE WITNESS: Yes.

10 MS. SERAFYN: Your Honor, I have it right here, and
11 I --

12 THE COURT: And you never gave it to him?

13 MR. GOLD: No, no, no. I got that yesterday morning.

14 MS. SERAFYN: And I would have entered it as an
15 exhibit yesterday, but she wasn't allowed to testify, so --

16 THE COURT: I'm not faulting you. I want to
17 understand it.

18 MS. SERAFYN: Right, but I'm saying I can put it in on
19 redirect.

20 THE COURT: Are those factors that you relied on in
21 your report the same factors that you handed Mr. Gold
22 yesterday?

23 MS. SERAFYN: I handed it to Mr. Gold.

24 THE COURT: Or whoever to Mr. Gold?

25 THE WITNESS: Yes.

1 THE COURT: All right, okay. So what you just put up
2 on the screen, Mr. Gold, are those the factors?

3 MR. GOLD: Those are the factors, I believe, that we
4 were talking about in March of 2010.

5 THE COURT: Okay. So, in your view, these are
6 outdated factors, or at least not complete?

7 THE WITNESS: No, that's not true. These are
8 characteristics of the samples in the high-risk sample type,
9 and they will always be characteristics of the high-risk
10 sample. I was just trying to inform my audience what those
11 individuals were like because they were different. They came
12 from six different hospitals and prisons. So I was just
13 saying, here's a description of this high-risk sample, here's a
14 description of that high-risk sample.

15 THE COURT: Sure, okay. So are any of the published
16 criteria picking up the kinds of things that you used in
17 categorizing Mr. Carta?

18 THE WITNESS: The SRA, okay, is the instrument that I
19 was trained on. Papers will be submitted and coming out with
20 that instrument.

21 THE COURT: Well, does the SRA have these factors that
22 you relied on?

23 THE WITNESS: Yes.

24 THE COURT: Impulsivity, intimacy deficits and the
25 like?

1 THE WITNESS: Basically all of them.

2 THE COURT: They use those words?

3 THE WITNESS: They say it a little differently.
4 Instead of "emotional identification with children," it's
5 called "emotional congruence with children." So, yes, but it's
6 the same factor. All but two factors are the same.

7 THE COURT: And what are those two?

8 THE WITNESS: Sexual violence is on the SRA and it's
9 not on the Stable-2000, and -- I'm just going to refresh my
10 memory.

11 (Witness examining document.)

12 THE WITNESS: Oh, here it is. Grievance thinking is
13 not on the Stable-2000. Actually, a very similar item about
14 distorted attitudes was, but I did not use it. And those are
15 the two that are primarily different. The rest are defined in
16 the same, way but their name is a touch different.

17 THE COURT: So you'd say they're substantially the
18 same?

19 THE WITNESS: Yes.

20 MR. GOLD: Your Honor, can I ask a couple of questions
21 about --

22 THE COURT: Yes, and then we'll break, have a morning
23 break here.

24 Q. The SRA: FV, you reproduced the scoring in your report,
25 right?

1 A. Yes.

2 Q. And it's got a very complicated -- well, I'm calling it
3 complicated, but it's a whole chart, right?

4 A. Yes.

5 Q. And the score that you get is, you actually report it in
6 decimal form. If I recall it's 4.8 something, 4.84 or
7 something?

8 A. Right, 4.64.

9 Q. 4.64. And that is a very precise number. It's less than
10 4.65 and more than 4.63, right?

11 A. Right.

12 Q. Or in that range. And the report requires you to do
13 division, I think, there is a division symbol in there to get
14 to that result, right?

15 A. Right.

16 Q. Now, these four samples, who has done that? Who has used
17 the SRA: FV to justify this initial decision?

18 A. Well, evaluators in California are using it.

19 Q. Starting when?

20 A. Right after the training on the --

21 Q. Starting in December, right?

22 A. Right.

23 Q. So this is the brand-new bag on how to justify putting
24 individuals into these bins, right?

25 A. It's more precise to be able to allow you to choose a bin.

1 Q. Well, it gives you this number which is very specific,
2 right?

3 A. That's right.

4 Q. Right. But that's not how the samples were originally
5 broken up, right? No one did the SRA: FV on them, right?

6 A. No. They were originally chosen by characteristics
7 outside the actuarial instrument.

8 Q. Right, and -- okay.

9 MR. GOLD: Judge, is that -- okay.

10 THE COURT: Let me just put it this way: We should
11 take a break. We've been going for two hours. Everyone needs
12 a break. How much longer do you think you have? We can go off
13 the record for a minute for poor Lee, who has been going at
14 this for all morning.

15 (Discussion off the record.)

16 (A recess was taken, 11:16 a.m.)

17 (Resumed, 11:53 a.m.)

18 MR. GOLD: May I inquire?

19 THE COURT: Yes.

20 BY MR. GOLD:

21 Q. Dr. Phenix, you scored three of these instruments, right?

22 A. Yes.

23 Q. And the other one or the second one is the Static-2002,
24 correct?

25 A. R, yes.

1 Q. The Static-2002R. And in interpreting that score, it has
2 the same process of choosing a sample before you report the
3 percentage associated with a score, right?

4 A. Yes.

5 Q. But the nominal category that is assigned to the
6 Static-2002R score that you got is moderate high, right?

7 A. Right.

8 Q. Right?

9 A. Moderate, I believe. Let me just check.

10 Q. Or moderate, moderate.

11 (Witness examining document.)

12 A. Moderate.

13 Q. So the Static-99R is a moderate high, the Static-2002 is
14 moderate, and the MnSOST-R is high, correct?

15 A. Yes.

16 Q. Now, you reviewed all the records that you were provided
17 when you were asked to evaluate Mr. Carta, right?

18 A. Yes.

19 Q. And you did not have the benefit because of Court rulings
20 of a clinical interview with Mr. Carta, right?

21 A. Yes.

22 Q. And it's typical ethical practice to state that or qualify
23 your opinion when you don't have the benefit of a clinical
24 interview, correct?

25 A. Yes, generally. I mean, you would say that.

1 Q. And you have, however, reviewed reports of things
2 Mr. Carta has said in the course of his life and especially the
3 past eight years, right?

4 A. Yes.

5 Q. He was evaluated by a Dr. Leonard Bard, and you've read
6 Dr. Leonard Bard's reports, right?

7 A. Yes.

8 Q. And the same with Dr. Prentky, you've read his report?

9 A. Yes.

10 Q. And you've also read a Bates-stamped series of documents
11 over a thousand pages long which pertain to Mr. Carta, right?

12 A. Yes.

13 Q. So Mr. Carta has been in Bureau of Prisons custody for
14 approximately eight years, right?

15 A. Yes.

16 Q. And he did the sex offender treatment program at Butner
17 for about a six- or seven-month period? Does that sound right?

18 A. Yes.

19 Q. He also completed something called the Code Program. Do
20 you recall that?

21 A. Yes.

22 Q. And for the record, I am putting up on the screen a
23 document which carries Bates stamp No. 426, and is 426 among
24 the documents that you reviewed in preparing for this case?

25 A. Yes.

1 Q. Now, this document is a document from the Bureau of
2 Prisons which indicates that "Mr. Carta successfully completed
3 the Code Program at USP Allenwood on November 24, 2003."

4 Did I read that line correctly?

5 A. Yes.

6 Q. And "The Code Program is a yearlong residential treatment
7 program focusing on both group and individual counseling
8 sessions"?

9 A. Yes.

10 Q. "Topics include family issues, criminal thinking, drug and
11 alcohol issues, and pro-social choices," right?

12 A. Right.

13 Q. Now, Mr. Carta wanted to withdraw several times from the
14 Code Program. Do you recall reviewing that in the records?

15 A. Yes.

16 Q. And then was cajoled back in by his -- I use the word
17 "cajoled," but he was encouraged to stay back in by his
18 therapist in that program?

19 A. Yes.

20 Q. Now, another actuarial that you use is the MnSOST-R,
21 right?

22 A. Yes.

23 Q. And that stands for Minnesota Sex Offender Screening Tool
24 Revised, right?

25 A. Right.

1 Q. That was developed by a researcher named Douglas Epperson?

2 A. Right.

3 Q. And do you have a relationship with Douglas Epperson other
4 than professional?

5 A. I'm married to him.

6 MS. SERAFYN: Objection, your Honor.

7 THE COURT: Overruled.

8 A. I'm married to him.

9 Q. Now, has a similar -- do you choose a sample with the
10 MnSOST-R when you score it?

11 A. No. Well, I'm sorry, let me qualify. There are new
12 release probabilities of reoffense. So it doesn't have a
13 sample type name, but it's a more contemporary sample, so I
14 would examine both the older sample and the newer sample.

15 Q. And if I read your report correctly, so similar to what's
16 been happening with the Static-99, Dr. Epperson tested out the
17 MnSOST-R on a contemporary sample and got lower results; is
18 that right?

19 A. Lower results for the higher-risk samples, yes.

20 Q. Lower results for the people who scored higher on the
21 instrument?

22 A. Right. The probabilities for the low-risk samples were a
23 little -- pretty much the same.

24 Q. Okay. And you report those in your report as 30 percent
25 for the high-risk group?

1 A. Right.

2 Q. And then I think -- well, first, let me ask you, have the
3 new norms been published?

4 A. No. They'll be -- they're in press. They are chapters
5 submitted to a book I'm editing.

6 Q. So you're editing a book, and the new results on the
7 MnSOST-R will be coming out in that particular book?

8 A. Right, and the book will be submitted in a couple of
9 months.

10 Q. And when is it scheduled to appear?

11 A. You know, that I don't know. I know that I need to submit
12 it in about two months.

13 Q. And when we talk about a book chapter appearing as opposed
14 to an article in periodical literature, the peer-review process
15 is not the same, is it?

16 A. Well, it's similar. The editors of the book need to
17 review the chapter. We sometimes ask for significant
18 revisions, and those need to be made for it to appear in the
19 book. But for journals, there is a review panel that would do
20 a similar job of making recommendations to be published in
21 their journal.

22 Q. But with a journal, typically the reviewers are anonymous,
23 correct?

24 A. Not always, but oftentimes they are.

25 Q. And that's part of our understanding of what peer review

1 is about. The anonymous reviewers, if you pass that hurdle,
2 then we have an indication that the research has passed some
3 threshold of good science, right?

4 A. That's right.

5 Q. But with the book-editing process, it's a little
6 different, in that there are no anonymous reviewers, more of an
7 editor-author type relationship? Is that fair to say?

8 A. Yes.

9 Q. Now, in your report you report both the 30 percent rate
10 for this high-risk sample and the 57 percent rate, which I
11 understand to pertain to the old information, right?

12 A. Correct.

13 Q. And your justification for doing that is -- well, what is
14 your justification for reporting both of those numbers? And
15 it's a six-year period, correct?

16 A. It's a six-year period measuring rearrest. The
17 justification was what I said yesterday, and that was that
18 Dr. Epperson believes that the higher recidivism rate is really
19 the person's true risk with those higher scores. However, they
20 implemented a very intensive community supervision program in
21 Minnesota, and so what happened was that many of those
22 offenders that were higher risk that were released were revoked
23 and not in the community for that period of time. So the
24 recidivism rates went down because those offenders were largely
25 locked up. And so in communities where there are intensive

1 community supervision programs, which is almost everywhere
2 these days, then Dr. Epperson has recommended that you use the
3 lower probabilities during that period of community supervision
4 because the threat, the person's threat to reoffend is reduced
5 significantly; but then when they're off community supervision,
6 he believes the true risk would equal what the old
7 probabilities were, 57 percent.

8 So I report both, and then I say, for the period of time
9 that the individual remains on community supervision, they pose
10 that lower probability of reoffense, in general. Of course, it
11 doesn't apply to an individual but in general, and then that
12 that would increase once the person is off of community
13 supervision.

14 THE COURT: What if they get off supervised release
15 when they're much older?

16 THE WITNESS: That could affect their risk. That
17 could lower the risk, depending upon how much older they are,
18 what type of offender they are. It would be much more so for
19 someone who rapes rather than molests.

20 THE COURT: Well, what about Mr. Carta?

21 THE WITNESS: Mr. Carta has very pervasive deviant
22 sexual interests, and we generally don't look at a significant
23 reduction in probability of reoffense at his current age. As
24 he turns sixty and certainly turning seventy, we would make
25 that consideration outside the actuarial instrument. I'm also

1 looking at actuarial instruments that include his aging process
2 already, and those are moderate to moderate high risk.

3 Q. Well, the Static-99 we just talked about had a major
4 revision in which they sort of incorporated the results of all
5 this research about the impact of age on sexual reoffending.
6 Has a similar process happened with the MnSOST-R?

7 A. No.

8 Q. And all this theory -- I'm going to call it a theory of
9 Dr. Epperson's that the reason for the results that he obtained
10 was because of supervision, that's an argument that he advances
11 based on the evidence in this forthcoming article?

12 A. Yes.

13 Q. So it's essentially an assertion in a yet-to-be-published
14 research article?

15 A. Right. It will be supported in the research article. It
16 was supported in the training that I received when the new
17 norms were released. He trained the California sexual predator
18 evaluators, so we learned the data there and how he came to
19 those conclusions.

20 Q. It's a principle in this research that the longer you stay
21 out without offending, the rate of recidivism -- the threat
22 that an individual poses declines, is it not?

23 A. Yes.

24 Q. And so isn't that principle inconsistent with the idea --
25 for example, if Mr. Carta were to survive, in the language of

1 statistical analysis, without reoffending for three years --
2 the prior court heard extensive testimony from the actual
3 probation officer who would be supervising Mr. Carta, talked
4 about the panoply of protections that they have as well as the
5 therapist who would be treating him in sex offender
6 treatment -- assuming that he in that regime survived three
7 years, wouldn't his risk of reoffense have declined, in theory?

8 A. In theory, but we don't have a study to support that.
9 When you look at the time-free-in-the-community data from
10 Static-99 essentially and Static-2002 that was developed by
11 Dr. Hanson and is in the coding rules for Static-99, you do not
12 know how many of those samples were under community
13 supervision. And they're old samples, so we know that it
14 certainly wouldn't be like contemporary community supervision.
15 So it's a question that we can't really answer in terms of time
16 free and how that relates to being on community supervision and
17 that being a protection.

18 Q. Well, my question precisely, Dr. Phenix, was simply that
19 if he survives, based on this Static-99 research, not about
20 community supervision, but if he survived without reoffending
21 for three years, and his risk were to be evaluated at that
22 time, it would be lower, right?

23 A. Uhm, it would be lower, but we don't know how much lower,
24 and there weren't individuals like him in those samples, so I'd
25 be very cautious about applying time free in the community

1 while he's on community supervision to Mr. Carta.

2 Q. Well, but I believe you agreed with me with the principle,
3 that the longer you stay out without reoffending, the risk of
4 reoffending decreases?

5 A. I agree with the principle, yes.

6 Q. And that principle, at least to me, seems inconsistent
7 with this notion that for people who have -- you've reported
8 that if he survives for three years, then his risk will
9 increase. Am I misunderstanding how you're reporting the
10 MnSOST-R results?

11 A. Uhm, I don't think we're talking about exactly the same
12 thing. It was a different situation. I would not apply time
13 free in the community to Mr. Carta. What I would apply is that
14 he has general probabilities of reoffense while on community
15 supervision and a general probability of reoffense while not on
16 community supervision because he started out as a high-risk sex
17 offender. So while his risk may be slightly lower at three
18 years if he stayed on community supervision, he's off of
19 community supervision, so you're confounding the results, and
20 it would go up. Would it be 57 percent? I don't know. I
21 don't know if that applies to him, but --

22 Q. Well, that's the number that you reported --

23 A. Right.

24 Q. -- as being applicable to this case, right?

25 A. Study sample had a recidivism rate of 57 percent.

1 THE COURT: At which year?

2 THE WITNESS: At six years. The original Minnesota
3 sample released to the community in the high-risk range,
4 57 percent of them reoffended in six years.

5 THE COURT: That's not the number you're asking me to
6 rely on, right? I mean, you have lower numbers.

7 THE WITNESS: I have lower numbers on Static-99R and
8 Static-2002R and on the new data from the MnSOST-R during the
9 time he's under community supervision, but those probabilities
10 are higher when not on community supervision. It's just the
11 nature of the sample.

12 Q. Well, it's the old sample, correct?

13 A. Exactly, yes.

14 Q. So you report the old sample numbers and then also the new
15 sample numbers, right?

16 A. Right.

17 Q. And Dr. Epperson's theory, which has not yet appeared in a
18 published journal, is the reason is the supervision they were
19 under, right?

20 A. Yes. He looked at other factors. Treatment did not
21 affect. They both had the same treatment completion in both
22 samples. So by nature of ruling out other factors it could be,
23 it appeared to be community supervision.

24 Q. Now, you've testified that the reason you score three of
25 these things is because it's useful to have converging

1 evidence, that makes you more confident in your opinion, right?

2 A. That's right.

3 Q. And so here you have moderate high, moderate, and then
4 high, right?

5 A. Yes.

6 Q. Now, when you scored the MnSOST-R, you started out by
7 saying that you had -- and for the record, I'm putting on the
8 coding sheet which you scored which we were examining
9 yesterday, which has been entered into evidence, I know, but --
10 and you said you had noticed two errors, two mistakes?

11 A. Yes.

12 Q. And the first one was No. 3.

13 A. Yes.

14 Q. "Was the offender under any form of supervision when they
15 committed any sex offense for which they were eventually
16 charged and convicted?" You originally scored that zero, but
17 you increased that to 2?

18 A. Plus 2, correct.

19 Q. Plus 2?

20 A. Right.

21 Q. Now. And then you noticed a simple error on No. 7 where
22 it appears he has one victim class, but you had given him
23 plus 3?

24 A. Right.

25 Q. And that should be a zero?

1 A. I believe so, yes.

2 Q. I direct your attention to No. 15. There you gave him
3 plus 3 for treatment recommended but terminated?

4 A. I did.

5 Q. But we discussed earlier that Mr. Carta in fact withdrew
6 or quit voluntarily, he actually regretted the choice right
7 afterwards. Wouldn't that qualify him for a zero under "quit"?

8 A. Yes, that would qualify him for a zero under "quit." He
9 was put on probation, but I do believe that he quit while on
10 probation and was not terminated. I think that's correct.

11 Q. Well, in fact, and I know it's a long time ago, but you
12 were deposed and in fact previously testified in this very
13 case. Do you recall what score you gave him when you testified
14 about the MnSOST-R on the stand?

15 A. I believe he had a score of 11, which is what I originally
16 scored him.

17 THE COURT: I thought you testified that quitting sex
18 offender treatment was one of the dynamic risk factors you
19 considered.

20 THE WITNESS: Oh, it is a dynamic risk factor.

21 THE COURT: But Minnesota doesn't treat it that way?

22 THE WITNESS: Oh, no, they do, because you're higher
23 risk -- a zero is higher risk than a minus 1, so you do get
24 risk -- it's just scored differently. You do get a higher risk
25 than if you completed treatment.

1 Q. For the record, I'm putting on the screen your testimony,
2 Dr. Phenix, from the Carta trial, Page 19 where you were asked
3 the question by the government, "How did you score Mr. Carta on
4 the MnSOST-R? I scored him, I gave him an overall score of 5."

5 Does that refresh your recollection as to whether you
6 rescored the MnSOST-R for Mr. Carta prior to your testimony in
7 the case?

8 A. Right, I must have rescored it. I didn't recall it, but I
9 must have, yes.

10 Q. And based on the testimony that we just had, it seems
11 likely that the 11 that you reported in your report was revised
12 when you subtracted six points?

13 A. That would be correct.

14 Q. And now you've added an additional two points, correct?

15 A. I have.

16 Q. Which would give him either a 5 or a 7, right?

17 A. Uhm, no. I had an 8 because I subtracted three and added
18 two, so that would have been an 8. I can reexamine it.

19 Q. Well, you had an 11?

20 A. Uh-huh.

21 Q. We subtracted 6, and I believe that's what gave you a 5 in
22 February of 2009?

23 A. I don't remember how I scored it in 2009 in terms of what
24 I subtracted. I mean, I know the total points I subtracted,
25 obviously, because I had an 11 originally and it ended up to be

1 a 5. I'm not sure on what items.

2 Q. But you just agreed with me that the coding form pretty
3 clearly indicates that if you quit treatment, you do not
4 qualify for three points, Item No. 15?

5 A. Oh, I see what you're saying. Yes, that would have been
6 the 5, and if I reduced this by three, I would also have a 5,
7 so that would be the correct scoring.

8 Q. And so either a 5 or a 7 actually puts Mr. Carta in the 4
9 to 7 moderate range, right?

10 A. Right.

11 Q. Do you endorse that as the correct scoring of the MnSOST-R
12 on the stand right now?

13 A. Yes, I do.

14 Q. And so what we have here then is converging evidence of
15 moderate, moderate, and moderate high. Would you agree with
16 that?

17 A. I would.

18 THE COURT: So what's the new predictor under
19 Minnesota?

20 THE WITNESS: The new probabilities would be, for a
21 score of 5, that if he had community supervision during that
22 period of time, it would be a 20 percent probability of sexual
23 reoffense rather than 30; and if he did not have community
24 supervision, it would be a 25 percent probability of sexual
25 reoffense rather than 57 percent.

1 THE COURT: So since we know he's going to have
2 supervision, right --

3 THE WITNESS: For three years, I believe.

4 THE COURT: Yes, so the range for him will be
5 20 percent rather than 30 percent?

6 THE WITNESS: That's right, for those three years.

7 THE COURT: For the three years?

8 THE WITNESS: For the three years until he's off
9 community supervision, and then it would revert to the -- well,
10 just slightly higher, 25 percent, according to the instrument.

11 THE COURT: For how long?

12 THE WITNESS: For indefinitely until he has a new
13 evaluation. Perhaps because he's older, perhaps because of his
14 age, I would say that certainly those probabilities could be
15 reduced below 25 percent after he's sixty, according to group
16 data.

17 Q. All right, but, Dr. Phenix, just to clarify, the way that
18 you're reporting what the MnSOST-R means is different from the
19 way you report a Static-99 score. For example, you just
20 testified that the old numbers for Static-99 are not valid; you
21 report the new numbers, the most current information. But with
22 the MnSOST-R, you're reporting both, right?

23 A. Yes. I've been advised to report both.

24 Q. By Dr. Epperson?

25 A. Right.

1 Q. Now, if I wanted to review this book chapter, I would have
2 to ask you personally for it because it's not available,
3 correct?

4 A. Right.

5 Q. Now, Mr. Carta had his first conviction for any sex
6 offense at the age of forty, right?

7 A. Yes.

8 Q. He was in a relationship with Fred who was seventeen years
9 old at the time of the relationship?

10 A. That's right.

11 Q. You testified briefly yesterday that he got into a fight
12 with Mr. (Redacted) in October of 2000 --

13 MS. PIEMONTE-STACY: If we could just move to strike
14 the last name of the minor.

15 MR. GOLD: Oh, did I say the name? Oh, I was careful
16 the first time.

17 (Discussion off the record.)

18 Q. -- that he had an incident with this young man, and the
19 police were called? It resulted in a charge of disorderly
20 conduct?

21 A. Correct.

22 Q. And then that dispute between him and this young man
23 continued, and he wrote a letter and tried to embarrass or
24 humiliate this young man, right?

25 A. Yes.

1 Q. And, coincidentally, he was being investigated for child
2 pornography at the same time, right?

3 A. Yes, some time during that period. I don't know exactly
4 when.

5 Q. And a search warrant was executed at his house in February
6 of 2001, right?

7 A. Yes, it was.

8 Q. And then Mr. Carta basically disclosed his activity
9 regarding child pornography to the police, right?

10 A. Yes.

11 Q. And then he was released for a substantial period of time,
12 right?

13 A. I have to check my records here for a moment.

14 (Witness examining documents.)

15 A. I don't know for what period of time he was released. I'm
16 sorry, I don't seem to have that date.

17 Q. Well, I will see if I can give you a document which
18 refreshes your recollection, but before I do that, he ended up
19 pleading guilty to child pornography in April of 2002?

20 (Witness examining document.)

21 A. I have an arrest and charge in April of 2002 and then --
22 oh, I see, bailing out at that time in my notes. I didn't know
23 that there was a plea in April of 2002. I'd have to go back
24 and look, but if you have that, then that would be true.

25 MR. GOLD: Your Honor, I feel like I just want to tell

1 the Court what happened to him, but I guess that's not
2 orthodox.

3 THE COURT: What are you talking about?

4 MR. GOLD: Mr. Carta came in in a negotiated
5 disposition, pled to an information in April of 2002 in front
6 of, I think, Judge Squatrito in Connecticut. Then he was
7 released. He was sentenced in October of 2002 and required to
8 start serving his sentence at that time.

9 THE COURT: Would that make a difference if that's
10 true, does that make a difference to your diagnosis?

11 THE WITNESS: No, I believe that that is true. I just
12 didn't know that -- I knew he was arrested and charged in April
13 of 2002. I just didn't have the date of the plea, but I
14 certainly believe that counsel is correct.

15 Q. Well, you read the presentence interview report, the
16 presentence report by Probation that was produced, right?

17 A. Yes, I did.

18 Q. And for the record, I am putting on the document viewer
19 the first page of that report which appears under our Bates
20 stamp series at 82, and there it says "Date of plea, 4/9/2002"?

21 A. Right, that's true.

22 MS. PIEMONTE-STACY: Your Honor, we'll stipulate to
23 the date of plea and that information contained on Bates
24 Stamp 82.

25 Q. And so this presentence report reflects that Mr. Carta was

1 home during the period of the presentence interview?

2 A. I guess I'd have to be reminded of the date of the
3 presentence interview.

4 THE COURT: Take his word for it.

5 A. Yes, I take your word for it.

6 THE COURT: You need to wrap this up.

7 MR. GOLD: Right. Right, right, right.

8 Q. The point is, he was out from April until October while
9 these charges were pending, right?

10 A. That's true.

11 Q. And there's no evidence of misconduct of any kind during
12 that period that you have available to you, right?

13 A. That's true.

14 Q. And in fact the conviction for risk of injury to a minor
15 occurs from before -- the allegations stem from before the
16 disorderly conduct conviction, correct, if you know?

17 (Witness examining document.)

18 A. I don't know when the allegations stem from. It was all
19 rather confusing, that timeline to me, but it was in the
20 proximity of that time.

21 Q. Well, in fact those allegations first come to light
22 because after the disorderly conduct, the young man who's the
23 older brother of the victim tells the police about it?

24 A. Right.

25 Q. Right. And that happens in approximately February of

1 2001, right?

2 A. Yes.

3 Q. So Mr. Carta is not someone who has been sanctioned for a
4 sex offense, then released, and then reoffended, right?

5 A. Right.

6 Q. And is it true in your experience that very often in these
7 cases, we're dealing with individuals who have reoffended after
8 being sanctioned for a sex offense?

9 A. Yes.

10 Q. And in fact that's one of the big scoring items in these
11 actuarials that we've been talking about is number of prior
12 offenses, right?

13 A. Right. It is a scoring item in all of them.

14 THE COURT: Can I just ask, just to sum up for a
15 minute, so he's a moderate risk in most of these tables,
16 moderate, right?

17 THE WITNESS: Moderate to moderate high on Static-99.

18 THE COURT: All right, so moderate on two and moderate
19 to high on a third, okay. So that puts him somewhere between
20 22 and 39 percent chance of offending in five years, right?

21 THE WITNESS: Yes.

22 THE COURT: Somewhere in that ballpark. So what is
23 it -- I mean, putting these actuarial tables aside for a
24 minute, that's below 50 percent.

25 THE WITNESS: Right.

1 THE COURT: Okay, so what is it that makes you think
2 he can't control himself if I released him subject to
3 conditions?

4 THE WITNESS: Because his controls were so poor when
5 he was in the community previously, he was so sexually
6 preoccupied with his deviant arousal, because he did not stop
7 himself multiple times from acting out on that, and because
8 nothing's changed.

9 THE COURT: So that's an analysis apart from these
10 actuarial tables?

11 THE WITNESS: Yes.

12 THE COURT: I mean, I'm not saying that they don't
13 supplement your thought process, but essentially you're relying
14 on his conduct at the prison and his conduct over a period of
15 years?

16 THE WITNESS: Right. I'm looking at his entire life
17 to see if he has ever developed volitional controls, the
18 ability to manage his deviant arousal, which he still has and
19 will have throughout his life; his hypersexuality which led him
20 to ignore all of life's responsibilities, only to look at child
21 pornography; and to see what would have changed him between
22 that time when he was arrested and today; and the difficulties
23 that he had in sex offender treatment indicate to me that there
24 has been no substantial change.

25 THE COURT: So I understand that, and that makes

1 common intuitive sense, but that's not something that these
2 tools help me a lot with.

3 THE WITNESS: He's moderate to -- he looks lower risk
4 on the actuarial instruments because his crimes were not
5 detected, and then he was released and reoffended. He was able
6 to offend throughout his life.

7 THE COURT: So you're telling me to look beyond the
8 instruments.

9 THE WITNESS: Yes, I always look beyond the
10 instruments, at each case individually. He will not score high
11 on these instruments for a number of reasons but primarily
12 because he hasn't been adjudicated, as counsel pointed out,
13 prior to this time and reoffended.

14 THE COURT: Anything else you want to ask?

15 MR. GOLD: Judge, I've got a few more, just five
16 minutes?

17 THE COURT: Five minutes you've got.

18 MR. GOLD: Five minutes.

19 Q. Well, part of the purpose of the instruments is because
20 they tell us information that our gut might not tell us, right?

21 A. Uhm, they tell us information about reoffense, of course.

22 Q. And they tell us sometimes things that might surprise us
23 based on our intuitive first response, right?

24 A. Sometimes.

25 Q. And so are you telling the Court that when the instruments

1 disagree with your kind of clinical judgment, you put the
2 instrument -- you disagree with the instruments?

3 A. No. I think I agree primarily with the instruments. I
4 think he poses a moderate high risk to reoffend. That agrees
5 with the Static-99. I'm really not saying anything different.
6 I think that in this case, those in the moderate range are
7 underestimates because of these other factors I've discussed.

8 (Pause.)

9 THE COURT: Why don't we do this: Why don't we get
10 the redirect in, and then you can do it on recross.

11 MR. GOLD: I'm just looking for one document. That's
12 the only delay.

13 THE COURT: I'll let you do it later, even if it's not
14 within the scope, if it's going to take a while.

15 MR. GOLD: That would be helpful if I can have that
16 opportunity.

17 THE COURT: Okay, we'll just put your stuff in, and
18 you can be looking for it, whatever it is you were --

19 MR. GOLD: Oh, I found it now.

20 THE COURT: All right, then go ahead.

21 Q. Now, I'm putting up again the March presentation that you
22 gave to the folks in New Hampshire. You know, this risk
23 assessment in a sense doesn't answer for us whether someone's
24 going to have serious difficulty controlling themselves. Is
25 that true?

1 A. Well, I think my risk assessment answers it. I address it
2 in my risk assessment, at least.

3 Q. These actuarial instruments give us a risk of reoffense
4 but are presumably completely agnostic as to whether the people
5 who reoffend are doing it because they can't control themselves
6 or for other what we would consider typical criminal reasons,
7 right?

8 A. Right.

9 Q. And so a risk assessment determining how likely it is may
10 not directly answer questions about Mr. Carta's volitional
11 control as he sits here right now, right?

12 A. Right.

13 Q. Right. And typically what an evaluator will look at when
14 they're assessing volitional impairment is someone's behavior,
15 right?

16 A. Yes.

17 Q. And, for example, you often see in these types of cases
18 with people who have the persistent deviancy that you say
19 Mr. Carta has, that they will act out sexually in prison,
20 right?

21 A. That could be.

22 Q. That could be, and in fact it does happen, correct?

23 A. Oh, it certainly happens.

24 Q. In fact, it happens in cases in this very court in which
25 you have been a witness testifying, right?

1 A. That's right.

2 Q. Right. And you don't have any evidence of that kind of
3 behavior for Mr. Carta for an eight-year period, correct,
4 sexual acting out?

5 A. Oh, no. He was grooming the youngest-looking males in his
6 treatment groups, and I believe he was grooming them for the
7 purpose of ultimately engaging in sexual activity.

8 Q. Well, you don't have any evidence of sexual activity for
9 Mr. Carta, right, sanctions or otherwise?

10 A. Right, there were no sanctions.

11 Q. Right. And those individuals were individuals of legal
12 age, right?

13 A. They were.

14 Q. Now, you don't have any evidence in Mr. Carta's case of
15 reoffending after being released, right?

16 A. Right.

17 Q. Right. Now, when you talked about this concept of serious
18 difficulty with volition, you said that these are factors that
19 evaluators that you were instructing should consider when
20 they're developing an opinion about it, right?

21 A. Right.

22 Q. And so you have "Overcame obvious barriers such as victim
23 protests, harm, or pain." There's no evidence of that in
24 Mr. Carta's case, is there?

25 A. No.

1 Q. "Been detected in the past and reoffended, did not learn
2 from experience or punishment," again, with regard to sexual
3 offending in particular, that's not a factor that we can apply
4 to Mr. Carta because we simply don't know, right?

5 A. Right.

6 Q. We don't know what impact going through this process for
7 four years, being incarcerated for five years, is going to have
8 on him as a person, right?

9 A. No, we don't know.

10 Q. Now, "Reoffended quickly after release," again, that's
11 something that we have no evidence on, correct?

12 A. Right.

13 Q. "He made verbal statements that he had few or no
14 controls," right, no evidence of that?

15 A. No statements, but it was obvious he had few controls.

16 Q. It was obvious?

17 A. Yes.

18 Q. Now, "The offense was risky and he would be easily
19 identified or caught," that's not a factor that applies to
20 Mr. Carta, right?

21 A. No. He chose victims that didn't have parental
22 supervision so that he would not be caught.

23 Q. And so that is a factor that you've identified to assess
24 volitional impairment which doesn't apply to Mr. Carta, right?

25 A. Right, no.

1 Q. And "Excessive number of offenses or victims," would you
2 characterize the number of victims in this case as excessive?
3 Does excessive have an operationalized number?

4 A. It doesn't. You just look at the case.

5 Q. Is it excessive here?

6 A. Well, three thirteen-year-olds I think is, you know, three
7 separate crimes is certainly concerning, and it was concerning
8 to me in considering his volitional controls.

9 MR. GOLD: Nothing further, your Honor.

10 REDIRECT EXAMINATION BY MS. SERAFYN:

11 Q. Dr. Phenix, what do we know about Mr. Carta's sexual
12 preoccupation?

13 A. He has very high levels of sexual preoccupation. It
14 certainly was reflected in his designing his life around
15 seeking out and being with young boys, spending twelve to
16 fourteen hours a day viewing child pornography, being on chat
17 lines, trying to access boys for sexual relationships. So it's
18 high, and it kind of spiraled, I would say, completely out of
19 control by the time that he was arrested.

20 Q. And do we know anything about what Mr. Carta was doing in
21 terms of sexual activity while he was looking at this child
22 pornography?

23 A. Well, he was masturbating up to two to three times a day
24 while looking at the pornography.

25 Q. And was he actually, you know, during the months or years

1 that he was looking at the child pornography, was he actually
2 also engaging in sexual activity with minors?

3 A. Yes, throughout that time.

4 Q. And on cross-examination you were asked about Mr. Carta's
5 participation in the Code Program, and Mr. Gold asked you about
6 the treatment that Mr. Carta participated in during that Code
7 Program. Do you recall the treatment?

8 A. Yes.

9 Q. And was there any sex offender treatment as part of the
10 Code Program?

11 A. No.

12 Q. Now, Dr. Phenix, I want to show you the table that
13 Mr. Gold made and that he showed you on cross-examination
14 regarding the Static-99 scores. Now, can you tell us, what
15 recidivism rates did you testify to during the first trial of
16 Mr. Carta before Judge Tauro?

17 A. That would have been in a five years probability of sexual
18 rearrest is 27.7 and in ten years 37.3.

19 Q. Okay, so that's in the middle table here?

20 A. Yes.

21 Q. Okay. And then what are the recidivism rates that you're
22 testifying to now in this trial?

23 A. That would be a five-year recidivism rate of 25.2 and a
24 ten-year recidivism rate of 35.5, so they would be very
25 similar.

1 Q. Now, I want to talk a little bit about this instrument,
2 the SRA: FV. Can you tell us who developed that instrument and
3 when was it developed?

4 A. Dr. David Thornton developed it in the last couple of
5 years and released it in December of this year.

6 Q. And is there a coding form associated with that
7 instrument?

8 A. Yes.

9 Q. I'm going to put a document on the screen here --

10 THE COURT: Do you want to introduce that, you said?

11 MS. SERAFYN: What's that? I'm sorry.

12 THE COURT: Were you going to mark that?

13 MS. SERAFYN: I will, your Honor, yes.

14 MR. GOLD: Your Honor, I think it's already in the
15 report.

16 Q. And is this the coding form that is associated with the
17 SRA: FV?

18 A. Yes.

19 Q. And how do you know how to score someone using this form?

20 A. It's defined in the coding rules. Each item is
21 operationally designed just like the Stable-2000 so that you
22 can tell if that factor is present for the individual or not,
23 and it has a lot of behavioral indices. For example, you would
24 get a 2 on the first item, sexual preference for children, if
25 they had three or more child victims under the age of fourteen,

1 and he had three age thirteen, so he would automatically get a
2 2 on that item. So there's a lot of behavioral indicators that
3 help you.

4 Q. Now, there are scoring manuals for other actuarial
5 instruments --

6 THE COURT: Is this a new thing that just you were
7 training on two weeks ago?

8 THE WITNESS: Yes.

9 THE COURT: And is this just an effort to regularize
10 like the actuarial instruments, what your judgment calls were
11 as to the bin?

12 THE WITNESS: Yes. The actual score on this will be
13 associated with which bin you should use.

14 THE COURT: Whereas before it was what we were talking
15 about before, you would make a judgment call; and this is an
16 effort to actually make it more scientific, if you will?

17 THE WITNESS: This does make it more scientific, yes.
18 It's not up to me.

19 THE COURT: So far, it's evolving, right? No one's
20 tested it or --

21 THE WITNESS: It's been validated, the instrument has
22 been validated. It was developed on the Bridgewater sample.
23 Drs. Knight and Thornton -- Dr. Thornton developed this
24 instrument on the Bridgewater sample and validated it on a
25 separate Bridgewater sample, so that's been completed. The

1 papers, I'm not sure -- the process of the paper that's being
2 submitted on the development and validation of the instrument
3 is validated nicely in the moderate range, and it added
4 incremental validity to the Static-99, so it was developed to
5 be used with Static-99R.

6 THE COURT: So it hasn't been published yet in a
7 peer-reviewed journal?

8 THE WITNESS: Right. It's too new, it's too new. But
9 it has been validated. I wouldn't use it if it wasn't.

10 Q. Dr. Phenix, are there manuals or guides associated with
11 any of the other actuarial instruments?

12 A. Yes, all of them.

13 Q. Okay. And you referenced the manual for the SRA. I'm
14 just going to put the front page on the screen here. Is this
15 the manual you were referring to?

16 A. Yes.

17 Q. And I just want to show you the -- well, actually, let me
18 step back. Is the scoring sheet a part of this manual?

19 A. Yes.

20 Q. Okay. And I want to show you the first page of this --

21 THE COURT: What does SRA: FV mean?

22 THE WITNESS: Structured Risk Assessment: Forensic
23 Version, so it's to be used for incarcerated offenders.

24 Q. I'm just showing you the second page of the manual, and
25 there's a section there that says "Purpose of This Guide." Can

1 you generally tell us what the purpose of the guide is?

2 A. The purpose of the guide is to make sure that you know the
3 correct coding rules and how to score the instrument and how to
4 interpret it.

5 Q. And can you just tell us again, what does this instrument
6 tell us?

7 A. It measures what Dr. Thornton calls "long-term
8 vulnerabilities," which we've been talking about essentially as
9 similar to dynamic risk factors. So it's measuring what we
10 call "dynamic needs," and it can actually give you a score
11 which is associated with essentially low, moderate, or high
12 dynamic needs.

13 Q. And are the dynamic risk factors contained in the scoring
14 manual?

15 A. Yes.

16 Q. So, Dr. Phenix, what are the risk factors that the SRA: FV
17 measures?

18 A. The first one is sexual preference for children. There is
19 increased risk for individuals who commit child molest or are
20 attracted to prepubescent or pubescent children, and this first
21 factor would measure that.

22 The second factor, sexualized violence, is a measure of
23 sexual arousal to sexual sadism, causing pain, torture, or
24 hurting another person, being aroused to the forcefulness in
25 committing a sex offense.

1 Q. And, Dr. Phenix, I'm actually just going to stop you
2 there. I'm sorry to interrupt, but just in the interest of
3 time, as we're talking about these, why don't we talk about
4 these specifically for Mr. Carta. So I'm going to put your
5 scoring sheet up on the screen here, and as you go through the
6 factors, can you explain to us just generally why you assigned
7 a certain score for Mr. Carta or generally why Mr. Carta meets
8 that particular factor?

9 A. Yes. In general, I can. I don't have the scoring manual
10 up here, but I gave him a 2 for sexualized preference with
11 children. That's operationally defined. If you have three
12 victims or more of children under age -- males under age
13 fourteen, you automatically receive a score of 2. Each item is
14 scored zero, 1, or 2, and 2 is the maximum risk points.

15 The second item is sexualized violence, and this is much
16 more pertinent to individuals who commit rape behaviors, and
17 Mr. Carta has not. That is not how he seeks out individuals
18 for sexual activity, except in one instance we know where he
19 forced sexual activity on a seventeen- or eighteen-year-old
20 male who was nonconsenting, but he wasn't -- there's no
21 indication he was aroused to the nonconsenting aspects of that.
22 The young man was asleep, so it was just an easy victim for
23 Mr. Carta. So I gave him a zero on that. I didn't see signs
24 of arousal to sexual violence.

25 He does, however, have, as we know, a significant sexual

1 preoccupation. That's measured in two ways. On the narrow
2 measures of preoccupation, it's essentially just being
3 preoccupied with sexual matters. And in this case, because of
4 his extensive use of pornography, he received a score of 2, as
5 defined by the manual.

6 The broad sexual preoccupation refers to essentially signs
7 of just hypersexuality, and for him, I gave him a score of 1 on
8 that. He did not meet the full criteria.

9 You, however, add those two items, narrow and broad
10 hypersexuality, and got a total score of 3 divided by 2 which
11 becomes a decimal, 1.5. So that is the sexual interest domain.
12 That is equivalent on the Stable-2000 to the sexual
13 self-regulation factors. They're similar.

14 There's a second domain, and that's how a person relates
15 to others. It's similar to the intimacy deficits factors on
16 the Stable-2002, and the first one, LEIRA, is actually defined
17 as "lack of emotionally intimate relationships with adults."
18 So that is the same as intimacy deficits. I gave Mr. Carta a 2
19 on that due to his associating primarily with inappropriate
20 sexual partners who are younger and not maintaining or
21 sustaining -- defined in this item, not maintaining or
22 sustaining a relationship over a two-year period with an
23 appropriate partner without problems.

24 He scored a 2 on emotional congruence with children, which
25 is the same as emotional identification with children on the

1 Stable-2000. This is a person who really feels very
2 emotionally close to children. They comfort him. He feels
3 lonely, and he gets a great deal of comfort from being with
4 them. So he identifies with children emotionally rather than
5 just engaging in sex with them. That's only part of the
6 picture for Mr. Carta.

7 Callousness as well as two of the items in
8 self-management, which is the category below, is measured by
9 scores on the Hare Psychopathy Checklist-Revised. So I scored
10 those items on that instrument.

11 Q. And is that the PCL-R?

12 A. That's the PCL-R.

13 Q. And how long has the PCL-R been around for?

14 A. Oh, since the '80s, I guess the early '80s perhaps?

15 Q. And is it --

16 MR. GOLD: Your Honor, I'm going to object at this
17 point. The testimony is now going to this instrument. The
18 scoring of it incorporates by reference another instrument
19 which I don't have.

20 MS. SERAFYN: I think that's disingenuous because I'm
21 sure that Mr. Gold is very familiar with the PCL-R.

22 THE COURT: Maybe yes, maybe no, but I'm not, and this
23 is running through a huge amount of information that I don't
24 know. I mean, this is like a whole -- I have no way of
25 evaluating this. It may be right, may be wrong. It's just I

1 think we're better off just going back with the old -- I have
2 no idea. I don't know what a PCL-R is. I don't know where she
3 gets it from.

4 MR. GOLD: Your Honor, just to clarify, it is a very
5 well-known instrument, so I wasn't claiming to be surprised by
6 it, but she's just said she's scored this other instrument
7 which is important to this. The PCL-R they use in the death
8 penalty context all the time. Psychopathy, you get a high
9 score, you're doomed. So that's what that is.

10 THE COURT: I'm not sure all these instruments are
11 that relevant anyway because they're all coming up at about the
12 same percentage, but this is adding a whole new dimension. Why
13 don't you finish it up, and then I'll figure out what I'll do
14 with it. How much longer do you have on this?

15 MS. SERAFYN: Well, I just wanted to run through the
16 rest of the factors.

17 Q. So, Dr. Phenix, you scored this PCL-R, and then what score
18 did you come up with for the relational style section of the
19 SRA?

20 A. That was a 1.68 domain score.

21 Q. Okay. And then moving on to the self-management piece.

22 A. Right, this looks at lifestyle impulsivity, which is also
23 measured on the Stable-2000, and those are scores from the
24 PCL-R. It examines resistance to rules and supervision. These
25 are what's called "factor scores" on the PCL-R. And

1 cooperation with supervision is examined on the Stable-2000 as
2 well, so we have already -- I've already examined that in my
3 testimony.

4 And then the final factor in self-management is
5 dysfunctional coping, and that equates to just simply poor
6 problem-solving, judgment and insight that is just impaired in
7 terms of making important life decisions.

8 And so the total self-management score was 5.4. I think
9 the important issue is that the overall score in scoring this
10 instrument would be consistent with placing him in the
11 high-risk sample type.

12 Q. So I just want you to explain a little bit about why this
13 score of 4.64 is consistent with placing him in the high-risk
14 bin. So once you score this instrument and you get a total
15 score, what do you do?

16 A. Well, you look at the grid of what sample type he falls
17 into, but that grid is developed statistically by looking at
18 the midrange group, which is preselected for treatment. And
19 you would see that the high-risk group is one standard
20 deviation higher in terms of reoffense rates than the
21 preselected for treatment, and the routine sample would be one
22 standard deviation lower than the preselected for treatment.
23 So it really essentially allows you to know if he's riskier as
24 a result of his needs or lower risk as a result of his needs,
25 or just --

1 THE COURT: Would you give me those numbers -- after
2 the trial is fine -- what his different reoffense rate is
3 depending on what bin he's in?

4 THE WITNESS: Yes.

5 THE COURT: Maybe there are four bins. We'll look at
6 all four of them.

7 THE WITNESS: Three bins.

8 THE COURT: Three bins.

9 THE WITNESS: Right.

10 Q. So, Dr. Phenix, is it fair to say that once you come up
11 with a score on the SRA, that you look at a grid, and that grid
12 determines which bin the offender is placed in?

13 A. Right. It tells you, from this score to this score, he's
14 routine; from this score to this score, he's preselected for
15 treatment; and scores above that, high and very high scores,
16 designated scores would be put in the high-risk needs sample.

17 Q. So if you score the SRA: FV, you're not using your
18 clinical judgment to determine which bin the offender belongs
19 in?

20 A. No. It's assigned.

21 Q. Now, you've testified previously that the dynamic risk
22 factors contained in the Stable-2000 are virtually identical to
23 the factors that you've just gone through here in the SRA; is
24 that correct?

25 A. Almost all of them are very similar.

1 Q. So what do you do once you come up with a score on the
2 Stable-2000? In other words, do you use your clinical judgment
3 at that point, or do you not use your clinical judgment to
4 place the offender in a bin?

5 A. I use my clinical judgment because there is no
6 interpretation -- first of all, I don't score that instrument
7 because it was normed on a community sample, so there are
8 certain things I can't score on this Stable-2000. So I don't
9 score it, and there is no mechanical calculation of how to
10 assign a sample type from a score on Stable-2000.

11 Q. And when you considered the factors in the Stable-2000,
12 you determined that Mr. Carta belongs in the high-risk bin; is
13 that right?

14 A. I did, yes.

15 Q. And when you used the grid that removes clinical judgment
16 from the SRA, that also placed Mr. Carta in the high bin; is
17 that right?

18 A. Right, yes.

19 MS. SERAFYN: If I could just have a moment, your
20 Honor?

21 (Discussion between government counsel.)

22 THE COURT: Anything?

23 MR. GOLD: A couple.

24 BY MS. SERAFYN:

25 Q. Dr. Phenix, what is the age range for a diagnosis of

1 hebephilia?

2 A. The age range would be deviant sexual arousal, and, you
3 know, for example, the new guidelines, age eleven to fourteen.

4 Q. And on cross-examination Mr. Gold asked you about your
5 testimony regarding the hebephilia diagnosis from the first
6 trial. Do you recall those questions?

7 A. Yes.

8 Q. And is your testimony now different from or consistent
9 with your testimony from the first trial regarding a hebephilia
10 diagnosis?

11 MR. GOLD: I'm going to object to that.

12 THE COURT: Sustained. We've gone through this.

13 Q. So, Dr. Phenix, does Mr. Carta have any victims within the
14 age range of eleven to fourteen?

15 A. Yes.

16 Q. How many?

17 A. Three.

18 Q. And how do the actuarial instruments that you've scored
19 inform your overall risk assessment of Mr. Carta?

20 A. They give me general guidelines of overall risk.

21 Q. But do you consider information outside of the actuarials?

22 A. Of course. There is no actuarial instrument that includes
23 all the risk factors for future sexual reoffense, and every
24 case is different.

25 MS. SERAFYN: Your Honor, I'd like to move into

1 evidence the SRA: FV Coding Manual that Dr. Phenix testified
2 about.

3 MR. GOLD: I object to that, your Honor. I don't know
4 if we need it. I mean, she's got it in her report.

5 THE COURT: Sustained.

6 MS. SERAFYN: Well, your Honor, she only has the
7 scoring sheet in her report. The manual --

8 THE COURT: This is late produced yesterday. Whether
9 it eventually comes in, I don't know, but it was just generated
10 two weeks ago. I just don't have a basis. I'll take her
11 scoring. It sort of validates -- you know, there are two
12 different ones, the 2000 one and this thing. It's just
13 brand-new. As she says, it's brand-new. It's not even in a
14 peer-reviewed journal yet. It hasn't even been accepted into a
15 peer-reviewed journal yet. It's just being developed.

16 MS. SERAFYN: I was just thinking in the interest of
17 completeness, since we've had a lot of testimony about it,
18 that --

19 THE COURT: I sustain the objection. Any questions?

20 MR. GOLD: Just a couple, your Honor.

21 RECROSS-EXAMINATION BY MR. GOLD:

22 Q. First of all, you brought up the incident with the
23 seventeen- to eighteen-year-old who was nonconsenting, right?

24 A. Yes.

25 Q. Now, that in particular, again to emphasize in this case,

1 an aspect of this case is that all the information we have
2 about his offending comes from him, right?

3 A. That's right.

4 Q. His disclosures, his voluntary disclosures in treatment,
5 right?

6 A. Correct.

7 Q. And so we don't have any official record or other record
8 about these offenses but his own accounting, right?

9 A. That's right.

10 THE COURT: Yes, I know that.

11 Q. Right. And so in this case, the seventeen- to
12 eighteen-year-old, Mr. Carta said he was getting signals from
13 that person, right?

14 A. He thought he was flirting with him.

15 Q. He thought he was being flirted with. He started to
16 interfere with that person while that person was asleep, right?

17 A. Yes.

18 Q. And then the person woke up, right?

19 A. Yes.

20 Q. And that was the end of it, right?

21 A. Well, I think there was a big --

22 Q. Well, he said he yelled, said, "what are you doing?"

23 A. Right.

24 Q. And left. And that was the end of that incident right?

25 THE COURT: Was that the seventeen-year-old or the --

1 MR. GOLD: The seventeen-year-old.

2 A. Yes, as far as I know.

3 Q. Now, again, does this material that you were talking about
4 explicitly apply to choosing the risk bin, the SRA: FV?

5 A. Yes.

6 Q. Does this scoring manual explicitly refer to choosing a
7 risk bin?

8 A. Not the manual, but additional information does.

9 Q. Additional unpublished information?

10 MR. GOLD: Nothing further, your Honor.

11 THE COURT: Thank you. You'll make your plane.

12 THE WITNESS: Thank you.

13 (Witness excused.)

14 THE COURT: All right, so what do we have in terms of
15 the availability? Do we have future dates here?

16 MR. GOLD: We promised that -- I have phone calls
17 scheduled with both of them. We're going to try to get them
18 in, but we need to do it, I think, when we're back at the
19 office early this afternoon.

20 THE COURT: Sure. All right, thank you. If we can't,
21 we can't, but I do have those mornings free next week, so it
22 would be nice to finish this, although I'm not sure we will be
23 able to, right, because let's assume we take a psychiatrist
24 today, you still might want to put Mr. Carta on, right?

25 MR. GOLD: Right, and we would like to make that

1 determination after we hear from the two others.

2 THE COURT: Sure. But that could be another morning,
3 so we may not finish it, depending on what you decide to do
4 with him, right?

5 MR. GOLD: Right.

6 THE COURT: And will you want to brief this
7 afterwards?

8 MR. GOLD: Yes.

9 MS. PIEMONTE-STACY: Yes, your Honor.

10 THE COURT: I mean, I've reread Judge Tauro's and the
11 First Circuit's opinion. It's clear that the first prong has
12 been met. No one's even disputing that. It's likely by clear
13 and convincing that the second prong has been met based on the
14 First Circuit opinion and what I've heard here today, but
15 that's not a done -- that may be something that would be
16 subject to -- because, I mean, I think Prentky is agreeing, as
17 I'm reading the reports, that hebephilia applies to a certain
18 age group, and I can't make up my mind finally until I've heard
19 from him, potentially, as well as the other two doctors, but at
20 least it looks as if the First Circuit sort of decided it.

21 MR. GOLD: Dr. Boudin, I think.

22 THE COURT: He did decide it, and he so far is coming
23 in consistently with that, but I haven't heard the whole record
24 yet, so I don't know whether we'll need briefing on that. It's
25 really the third issue that's very hotly debated here. So that

1 would be very useful.

2 Let me ask the government one question: Do you know,
3 has anyone looked at or cataloged the pictures that he was
4 looking at?

5 MS. PIEMONTE-STACY: We never had them, your Honor.

6 THE COURT: You've never had them?

7 MS. PIEMONTE-STACY: Any information we have is coming
8 from the PSR.

9 MR. GOLD: And, your Honor, I think what your Honor
10 has heard about frequency and numbers all come -- and this is
11 something we'll develop from the experts -- but from him again.
12 The high number amount is actually his estimate of what his
13 collection was at the height. He also characterizes what was
14 in his collection and makes other statements about it, but it's
15 all his report.

16 MS. PIEMONTE-STACY: Well, we agree with that. The
17 sex offender treatment program are also self-reports, but the
18 sexually explicit language, that came from the PSR, and the
19 prepubescent also came from that.

20 MS. SERAFYN: Yes, I was just going to add, your
21 Honor, that Exhibit 26 from the first trial is the plea, and
22 then on the third-to-last page there's a stipulation of offense
23 conduct that Mr. Carta signed, and that's what explains that it
24 was "child pornographic movies depicting minor children,
25 including prepubescent minor boys engaged in sexually explicit

1 conduct."

2 THE COURT: All right, but that doesn't help me as
3 much on this very, very narrow issue. He's not being charged
4 with being a pedophile, really, and everyone agrees that for
5 the most part, fifteen- to seventeen-year-olds are not what
6 hebephilia is about, and so it's really some of the boys he was
7 looking at in this eleven to fourteen-ish age group. It's
8 clear they were. He self-reported they were, but I don't have
9 any sense of proportion, right?

10 MR. GOLD: Well, the sex offender treatment, I mean,
11 it depends on how much you're going to rely on that, Judge, and
12 the credibility that you put on it. He's required to break
13 down the composition of his own collection. He does it in some
14 detail.

15 THE COURT: And it includes eleven- to
16 fourteen-year-olds, right?

17 MR. GOLD: I think so, but he's pretty explicit that
18 what he's interested in what he keeps for -- he said he was
19 addicted to the collecting. I don't know that this is hotly
20 disputed.

21 THE COURT: Well, I just don't have that, so if
22 someone has what he self-reported that was about, that's
23 relevant.

24 MS. PIEMONTE-STACY: It went in as Exhibit 26 and 27,
25 your Honor.

1 THE COURT: I just don't know that record because I
2 wasn't the first judge.

3 MS. PIEMONTE-STACY: And that's part of why I want a
4 brief, so that we can point out the pieces, so that I think it
5 would be helpful for the Court to point out the --

6 THE COURT: Let me just tell you what I'm struggling
7 with, and I haven't heard the other two psychiatrists nor
8 Mr. Carta. So I'm struggling with, he's, let's say, a moderate
9 risk to reoffend under any of these studies. Even if I have
10 questions about this most recent one and has it been validated,
11 it's coming out pretty consistently less than 50 percent,
12 unlike some of the other people I have who are over 50 percent.
13 So there may be reasons for that, but it is. So, I mean, at
14 the end of the day, though, I've got to make a decision based
15 upon my own personal judgment based on the evidence; and a
16 piece of it are these actuarial tables, but a piece of it is
17 the evidence, and a piece of it is the expert points of view.
18 I mean, the actual tables which we spent 90 percent on today is
19 only one piece of my puzzle, and they're coming out pretty
20 consistently. So while we've spent a huge amount of time on
21 them, they're not dispositive; they're just one piece of
22 evidence, right?

23 MS. PIEMONTE-STACY: Yes, your Honor.

24 THE COURT: I barely even looked at it in Shields, I
25 mean, because the evidence was so compelling otherwise in terms

1 of his past, Mr. Shields now I'm referring to. So, I mean, I
2 will look at the totality of the record, and I just don't know
3 that the Daubert hearing is necessary or that these actuarial
4 tables, which are all pretty consistent, tell you that much. I
5 don't know what moderate risk to reoffend, that tells you
6 something but not --

7 MR. GOLD: I'd like to -- can we revisit this after
8 the other two guys?

9 THE COURT: Yes, but I'm just telling you how I'm
10 thinking, sort of a running -- it was interesting today.
11 They're all sort of roughly coming out the same way, so we
12 could deconstruct each one of the ones that's basically coming
13 out in the moderate range.

14 MR. GOLD: Right, the scores are moderate. You know,
15 I think that the numbers -- I mean, our argument would be that
16 the numbers for our guys are overstated by the way that they're
17 deciding to construct this and that the numbers are actually
18 even lower. And, again, they can score --

19 THE COURT: Well, maybe your experts would say that.
20 I'm keeping an open mind, but I'm just saying I want to hear
21 everything, but I don't know that the differences between all
22 these tests and these scoring devices, which give me some
23 concern that they keep changing, except in this particular
24 case, they're relatively consistent, unless, as you say,
25 they're just dead wrong, and I guess I'll hear from your expert

1 on that. I mean, so, in any event, I will wait. You'll come
2 up with other dates for me. If we can finish it before, fine.
3 Otherwise, it may just spread out, which is unfortunate because
4 then we all forget. So if we can do it next week, I would love
5 it, Thursday and Friday, if possible. Good. See you later.
6 Bye-bye.

7 THE CLERK: It will be Wednesday and Thursday.

8 THE COURT: I meant Wednesday and Thursday.

9 MR. GOLD: Wednesday and Thursday.

10 THE CLERK: Court is in recess.

11 (Adjourned, 1:05 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 2-1
through 2-140 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action No. 08-12064-PBS,
United States of America v. Todd Carta, and thereafter by me
reduced to typewriting and is a true and accurate record of the
proceedings.

In witness whereof I have hereunto set my hand this 16th
day of December, 2010.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER